# INDEX.

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Where a reference is made under any head, the figures refer to the corresponding figures in the Index, and also to the paging of the volume. This plan has been adopted in order to enable the reader to turn at once to the case, should he so prefer, without previously consulting the Index.


ACCOUNT.

1. Where an account has been rendered and a balance struck and acquiesced in by the debtor, the imputed credits are to be considered as payments, but the credits must first be imputed to the payment of such charges as the debtor was legally bound to pay and not to such as he was under no obligation to pay. *Keane* v. *Branden*, 20.

2. An acquiescence in an account containing illegal charges, will not estop the debtor from pleading their illegality—the only effect of such acknowledgment is to dispense the creditor from any affirmative proof. A mere charge in an account of interest beyond the legal rate which has not been acknowledged or acquiesced in, will not preclude the creditor from the recovery of legal interest. *Ibid.*

ACTION.

1. Several distinct causes of action cannot be cumulated against several defendants in one suit, unless the defendants have a common interest to be adjudicated upon in one judgment. *Waldo* v. *Angomar*, 74.

2. Proceedings, under the Act of 1840, against a defendant for fraud, may be cumulated with a revocatory action for the rescission of the alleged fraudulent sale; and in such a proceeding it is not only the right but the duty of the plaintiff to make parties to the suit all who have an interest to be affected by the judgment. *Ibid.*

3. Actual possession of the land is a fact indispensable to be proved in order to sustain the possessory action. C. P. 47. *Searles* v. *Costillo*, 203.

4. A mere civil or legal possession is insufficient, unless it is shown to have been preceded at some time by a natural possession in the plaintiff or his author. *Ibid.*

5. No action lies for the price of fraud. The law leaves parties who traffic in forbidden things and then break faith with each other, to such mutual redress as their own standard of honor may award. *Boatner* v. *Yarborough*, 249.

6. When the defendant in a petitory action is evicted from land upon which he has for several years paid the taxes, the writ of possession should be suspended until the taxes are refunded to the defendant as *negotiorum gestor* of the plaintiff. *Weber* v. *Cousy*, 534.

ACTION (*Contined*).

7. The surety may be sued without making the principal a party to the suit.
*State* v. *McDonnell*, 741.

8. As against a naked tresspasser, the plaintiff in the petitory action is not bound to show a title perfect against the whole world.
*Coucy* v. *Cummings*, 748.

9. The Board of Underwriters in New Orleans being a body composed of private individuals, without being incorporated, and through their treasurer having received on deposit money to which the plaintiff was entitled, it was *held:* That a suit to recover the money could be maintained against the treasurer in his individual capacity.
*Bennett* v. *Wheeler*, 762.

10. A party may institute a petitory action for one tract of land, and in the same petition may sue the same defendant for slander of title of another and distinct tract, but could not in the same suit sue for a tract of land and for damages for slander of title to such tract.
*Williams* v. *Close*, 873.

11. The purchaser of property while in the peaceable and undisturbed possession of it, cannot maintain the revocatory action against his vendor to set aside the sale of the property to his own vendor, on the ground of fraud and simulation. *Suthon* v. *Castille*, 889.

See Courts.
See Taxes (for suit to recover back moneys)—*Campbell* v. *New Orleans*, 8.
See Sheriff—*Bell* v. *Keefe*, 374.
See Executors—*Reed* v. *Crocker*, 445.
See Sequestration—*Goodin* v. *Allen*, 448.
See Practice—*Greenwood* v. *New Orleans*. 426.
See Succession—*Tompkins* v. *Prentice*, 465.
See Contract—*Christian* v. *Monette*, 635.

ADVANCES.

By Factors—*Kean* v. *Branden*, 20.

AGENT.

See Principal and Agent.

ALIMONY.

See Succession—*Collins* v. *Hallier*, 678.

APPEAL.

1. Where property is under seizure at the suit of several attaching creditors, and judgment is rendered in favor of the plaintiff in the prior attachment, the others have a right of appeal from such judgment under Art. 571 of the Code of Practice, notwithstanding there had been no issue joined and no curator *ad hoc* appointed to represent the defendant in the subsequent attachment. *Keys, Maltby & Co.* v. *Riley*, 19.

2. Where defendant admits a part of the plaintiff's claim and deposits the amount in court, and the balance for which judgment is rendered is less than $300, the judgment being an entirety and the whole amount claimed in the suit being over $300, the court has jurisdiction of an appeal. *New Orleans* v. *Estate McArthur*, 47.

APPEAL (*Continued*).

8. Where property is seized under execution and the sale is enjoined by a third person claiming to be the owner, it is the value of the property under seizure, and not the amount for which the writ issued, which determines the right of appeal.
*State* v. *The Judge of the Seventh District*, 48.

4. When the defendant in a petitory action has called in his warrantor with whom issue is joined, the plaintiff cannot appeal from a judgment against him without making the warrantor a party to the appeal. If there be no appeal bond given in favor of the warrantor, the appeal will be dismissed. *Nouvet* v. *Heirs Armant*, 71.

5. If the appeal bond was insufficient at the time the appeal was brought up, the defect cannot be subsequently cured by the substitution of another bond. *Ibid.*

6. Where an appeal is taken from an interlocutory order and it neither appears that the matter in dispute exceeds $300, nor is alleged that the order appealed from will work an irreparable injury, the court will *ex officio* dismiss the appeal, although the appellee has not moved for the dismissal. *New Orleans* v. *Imley*, 87.

7. It is the amount due at the institution of the suit which constitutes the matter in dispute, and determines the right to appeal as affected by the amount involved. *Klein* v. *Wild*, 87.

8. When an appeal bond is not large enough for a suspensive appeal, it will sustain a devolutive appeal. *Montan* v. *Whitley*, 175.

9. An agent is a competent surety on an appeal bond. *Ibid.*

10. An appeal will not be dismissed merely on account of the carelessness of the officer in an obvious omission of a word in his return of the service of the copy of the petition of appeal. Such a case is completely within the scope of the Act of 1839. *Oulliber* v. *Joublanc*, 237.

11. A motion filed in the Supreme Court by the defendant, who is appellee, to have the judgment of the lower court amended by dismissing plaintiff's demand, is a substantial compliance with Articles 888 and 890 of the Code of Practice, and authorizes the entire reversal of the judgment of the lower court and a judgment of the appellate court in favor of defendant. *Hawford* v. *Adler*, 241.

12. An appeal from an order submitting a cause to referees is premature and will be dismissed. *Junek* v. *Hezeau*, 248.

13. When appeal is taken by motion in open court, one who is a party to the suit and who signed the appeal bond, although only as surety, will not be permitted to allege that he was not a party to the appeal.
*Conery* v. *Webb*, 282.

14. Under the terms "*et alii*," parties to the suit not expressly named, may be considered as included among the obligees in the bond. *Ibid.*

15. An appeal will not be dismissed on the ground that the judgment was not signed when the order of appeal was made, if it appears to have been signed at the time the transcript was made out.
*McGregor* v. *Barker*, 289.

APPEAL (*Continued*).

16. It is not necessary there should be as many copies of a record of appeal made out and filed as there may happen to be appellants with interests in any way conflicting. When the necessary parties are before the court, a transcript filed by any one of them will authorize the court to adjudicate upon the merits of the whole cause. *Ibid.*

17. An appeal will not be dismissed, in a case where the Clerk has notice that citations are necessary, by the filing of the petition of appeal, but fails to issue them. It is not indispensable that the petition of appeal should contain a prayer for a citation to the appellees.
*Barton* v. *Kavanaugh*, 332.

18. When a party has an adequate remedy by appeal, an application for a writ of mandamus will be refused.
*State* v. *Judge of the Sixth District Court of N. O.*, 342.

19. The refusal of the District Judge to allow the attorney in fact of the relator to represent him upon the trial, is a matter which could be presented to this court for revision by a bill of exceptions. *Ibid.*

20. Where proceedings are instituted *via executiva* against the widow in community and tutrix, who taxes a suspensive appeal in her capacity *as administratrix of her deceased husband's estate*, she is not entitled to a delay in the Supreme Court to have the heirs of her husband made parties to the appeal. If the heirs ought to have been made parties, and were not, the appellee might have moved to dismiss, but the appellant could not have been permitted to take advantage of her own laches. But it was not necessary to join the heirs in the appeal, for the purposes for which the administratrix had full capacity to represent the whole estate. *McCalop* v. *Fluker's Heirs*, 345.

21. The State may appeal in criminal cases where the indictment, charging an offence punishable with death or imprisonment at hard labor, has been quashed before trial, or held bad upon a demurrer. *State* v. *Ellis*, 390.

22. The appeal will be dismissed under the rule of court of 29th May, 1854, where the appellant has died since the appeal, and the administrator having received the twenty-five days' notice required by that rule, fails to make himself a party. *Rayne* v. *O'Brien*, 400.

23. The delay for applications for re-hearing is fixed by law at three judicial days, and longer time should not be allowed within which to move to reinstate an appeal dismissed under a rule of court. *Ibid.*

24. When in a redhibitory action an interlocutory order was made, authorizing the delivery of the slave into the custody of the defendant, upon the execution of a bond in favor of the plaintiff, it was held that the order was one which was calculated to produce, or which might occasion an irreparable injury, and that an appeal from such an order should be allowed. *State* v. *Judge of the Fifth District Court*, 455.

25. Even after a motion to dismiss an appeal has been filed, the certificate of the Clerk of the lower court to the transcript may be amended.
*The State* v. *Cole*, 471.

APPEAL (*Continued*).

26. The Act of 20th March, 1839, §19, enlarged the discretionary power of the Supreme Court contained in Art. 898 C. P., and made it imperative not to dismiss appeals for clerical errors not attributable to the appellant. *Ibid.*

27. It is not a sufficient reason to dismiss an appeal, "that the appeal was asked and granted, and the appeal bond given and approved before the judgment was signed, and at a time when there was no legal judgment thereon," for it is usual in the country to apply for an appeal before the judgment is signed. The appeal is considered as taken *nunc pro tunc*. *State* v. *McKeown*, 596.

28. An appeal from an interlocutory order, over-ruling a motion to dissolve an attachment, will be dismissed unless it appear that such order will work an irreparable injury. *Powel* v. *Hopson*, 615.

29. A motion to dismiss the appeal is too late after the lapse of three judicial days, from the filing of the transcript, and after the cause has been set down for trial at the instance of the party who moves for the dismissal. *Creevy et al.* v. *Breedlove*, 745.

30. Where an appeal is taken by one of the opposing creditors from a judgment homologating the tableau of distribution, it is not sufficient to give an appeal bond in favor of the syndic. The creditors on the tableau interested in maintaining the judgment, must be made parties to the appeal, or it will be dismissed, on the motion of any of them. *Simmons* v. *His Creditors*, 755.

31. The motion to dismiss on such a ground, is not too late after the expiration of three days from the filing of the record, as the court will, *ex-officio*, notice the want of parties for a final decree. *Ibid.*

32. The appellee, at any time before the cause is at issue on the merits, may have the appeal dismissed as being premature; the judgment of the lower court not having been signed. *Derbigny* v. *Trepagnier*, 756.

33. An appeal from a judgment against the two members of a commercial firm *in solido*, taken by one of the partners only, dismissed on the ground that the other partner against whom the judgment was rendered should have been made a party to the appeal, he having an interest in maintaining the judgment to secure his recourse against the appellant for his portion of the debt. *Saux* v. *Lefevre*, 757.

34. In a contestation between opposing creditors and the syndic of an insolvent, on their oppositions to the tableau of distribution filed by the latter, the decision of the court below on each of the claims in litigation, is a separate judgment belonging to the party in whose favor it was rendered, and binding upon all parties who did not appeal from it; nor can such judgment be disturbed on appeal, unless the party having an interest to maintain it is made a party to the appeal. *Beer & Co.* v. *Their Creditors*, 774.

35. Creditors whose claims have been disallowed, cannot make themselves parties to the appeal without giving bond; the appeal bond given by the syndic, will not suffice to maintain the appeal on the part of such

APPEAL (*Continued*).

creditors; these creditors are alone aggrieved by the judgment disallowing their claims, and not the estate represented by the syndic. In conflicts between creditors in which the syndic is without interest, he cannot be permitted to interfere, and cannot maintain an appeal. *Ibid.*

36. An appeal will not lie to the Supreme Court in an injunction suit to arrest the execution of an order of seizure and sale for a less amount than three hundred dollars, although the property seized is worth more than $300, and the plaintiff in injunction claims in his petition a larger sum for damages and attorney's fees. *Holland* v. *Duchamp*, 784.

37. A party who appeals from a judgment homologating an account, must make the heirs and creditors who are interested in maintaining it, parties to the appeal. *Condon* v. *Samory*, 801.

38. The Supreme Court will notice the want of proper parties to an appeal, without a motion to dismiss. *Ibid.*

39. Appeals in cases of contested elections must be considered as falling within the general rules applicable to appeals in all civil cases and when proper and necessary the return day may be extended. *Auld* v. *Walton*, 825.

40. The husband is a necessary party to an appeal taken from a judgment in favor of his wife, and if his name is omitted in the appeal bond, when the appeal is granted, as if on motion in open court, the appeal will be dismissed. *Lawrence* v. *Burris*, 843.

41. A party may abandon his appeal from the portion of the judgment which passed upon the title to the property, and retain the appeal as to the part of the judgment which condemned him to pay the fruits and revenues or their value. *Dwight* v. *Brashear*, 860.

APPRAISEMENT.

See SALE JUDICIAL—*Waddell* v. *Judson*, 13.

ARBITRATION AND AWARD.

1. The mere delay to make payment of the amount of an award, when the debtor has taken no steps to set it aside and has not denied its obligatory force, and when no formal demand upon him to enforce it has been made, will not subject the debtor to the payment of the stipulated penalty in addition to the amount of the award. *Bodett* v. *Lees*, 761.

ARSON.

See CRIMINAL LAW—*State* v. *Rohfrischt*, 882.

ATTACHMENT.

1. In every sale of a seaworthy steamer, where time is given for the payment of the price, it is to be considered as having been in the contemplation of the parties, that the vessel was to be employed in navigation, and even if that navigation extends beyond the waters of the State, in the absence of any allegation of fraud or insolvency, the vendor will not be permitted to attach the boat where the price is not yet due, by swearing that the debtor is about to remove his property out of the State before the debt becomes due. *Hogan* v. *Carras*, 49.

ATTACHMENT (*Continued*).

2. An attachment will not lie in an action for damages *ex delicto;* nor in an action for the settlement of a partnership before any liquidation of accounts, when, from the nature of the business, it is impossible that the plaintiff can swear with certainty to the amount that will be found due to him on a final settlement. *Barrow* v. *McDonald*, 110.

3. The true owner of goods in a factor's hands on consignment may require an account of the factor, although unknown to him. When the true owner has not presented himself to make any claims, and the factor, without having received any communication from him, and being under advances to the agent upon his drafts, passes the proceeds to the credit of the agent, by whom the goods were shipped, with instructions to that effect at the time of the shipment, he will be protected from liability to pay a second time. *Bullitt* v. *Walker*, 276.

4. When the goods, under such circumstances, were undisposed of at the time of the service of the interrogatories on the garnishees, *held:* that they are liable to seizure for the debts of the owner. *Held, also*, that in this case the owner of the goods, and defendant in the suit, was not a competent witness for the plaintiffs, but that the agent was a competent witness for the garnishees. *Ibid.*

5. The right of a plaintiff in attachment to follow the property attached into the hands of third persons who have acquired rights from the owner after the attachment, depends on the reality of the Sheriff's possession under the attachment. *Whann* v. *Hufty*, 280.

6. The possession of the keeper appointed by the plaintiff is the possession of the Sheriff, but if the plaintiff in the attachment is himself the keeper and suffers the property attached to be taken out of his possession and carried to a distant parish from his own residence, where it is sold without any steps having been taken to regain the possession, he cannot disturb the title of the purchaser. *Ibid.*

7. The garnishees had received from the defendants certain promissory notes, with instructions to place the proceeds to the credit of the intervenor, to whom the defendants were indebted. *Held:* That the property in the notes could only enure to the benefit of the intervenor when he had been informed of what was done, and had assented thereto; until then the defendants might have changed the destination of the property. The rule is that, when the proprietor may sell and deliver, the creditor can seize. *Conery* v. *Webb*, 282.

8. The right of priority of a creditor making the first attachment, will not be defeated in consequence of another creditor having discovered that there was a dormant partner interested in the property attached, and having attached his interest. *McGregor* v. *Barker*, 289.

9. When property it attached within the jurisdiction of our State courts, questions of privilege and priority among the attaching creditors, must be determined by the laws of Louisiana. *Ibid.*

10. A bill was drawn in Tennessee on a merchant in London, under an authorization to draw against shipments of tobacco to an agent of the London merchant at New Orleans. On the faith of such an authorization,

ATTACHMENT (*Continued*).

the intervenors discounted the bill, which the drawer afterwards refused either to accept or pay. *Held:* That the intervenors acquired no privilege upon the tobacco, which they attached in New Orleans, in the hands of the agent of the drawee, because they had no actual possession or control of the tobacco by themselves or by their agents.
*Ibid.*

11. Under such circumstances, in order to give the bill-holder such an interest in the tobacco as would defeat attaching creditors of the consignor, there should have been an agreement between the consignors and the consignee, that the tobacco should be held by the consignee for the benefit of the bill-holder, so that the latter would look to the fund for payment, and not to the consignee's personal credit. *Ibid.*

12. In attaching a vacant lot of ground or tract of land, it is not necessary the Sheriff should take possession of the property attached by the actual and corporeal detention of the same. *Boyle* v. *Ferry*, 422.

13. The execution of the writ has the legal effect of vesting in the Sheriff the the civil possession of the defendant. *Ibid.*

14. Where the defendant in the writ, or his tenant, held the natural possession of the property attached, it would be different. *Ibid.*

15. The accidental omission in the petition of the name of one of the plaintiffs, where they are a firm, will not vitiate an attachment where the affidavit was made by one of the firm on behalf of the firm, and the bond was given by the firm as principals. *Barrière* v. *McBean*, 493.

16. In such a case no new bond and affidavit are required. *Ibid.*

17. The property of a partnership having a domicil out of the State can be attached here in a suit against one of the partners. *Ibid.*

18. The garnishees received a lot of cotton from the defendants, with instructions to sell as soon as practicable or advisable, and pay over the proceeds to the intervenors. The garnishees communicated at once with the intervenors, and submitted themselves to their arbitrament of the propriety of an immediate sale, tendering their advice to hold on for a rising market. The intervenors accepted this advice, and directed the garnishees to delay sales. *Held:* That the *stipulation pour autrui* contained in the letter of instructions to the garnishees, having been accepted by the party for whose benefit it was made, could no longer be revoked by the shipper of the cotton.
*Burnside* v. *McKinley*, 505.

19. The intervenors acquired a vested interest in the cotton, which entitled them to a preference over an attaching creditor. *Ibid.*

20. Where the garnishee in an attachment suit has in his answers acknowledged to be in possession of property belonging to the defendant, it is not necessary there should be a seizure by the Sheriff to support the attachment. *Dwight* v. *Mason*, 846.

See DOMICIL—*Winter Iron Works* v. *Toy*, 200.
See GARNISHEE—*Gaty* v. *Franklin Insurance Co.*, 272.
See PRACTICE—*Yale* v. *Hoopes*, 460.
See OFFSET—*Vincent* v. *Gandolfo*, 526.

ATTORNEY-AT-LAW.

1. An attorney-at-law is entitled to claim commissions upon judgments obtained through his agency as well as upon moneys actually collected on executions and accounted for to his clients, although he be superseded by the appointment of another attorney.

*Morel* v. *New Orleans*, 485.

2. The curator *ad hoc* appointed to represent several defendants, is only entitled to the simple tax fee of ten dollars, unless he has made application on proof, to have the allowance increased in proportion to the services rendered. *Taylor* v. *Simpson*, 587.

See NEW ORLEANS—*Succession of Fletcher*, 498.
See INSOLVENCY—*McIntosh* v. *Merchants' Insurance Co.*, 533.

AUCTIONEERS.

See JUDICIAL SALE—*Lafitte* v. *Doiron*, 164.

AUTHENTICATION OF RECORD.

1. Where the clerk of a county court in another State, certifies the exemplification of a record, as being a true and correct copy of the record, &c., as far as the same remains on file and of record in his office, he certifies all that the law requires him to certify. It is not a valid objection to the completeness of the record, that the reasons on which the judgment was founded are not set forth; the reasons for the judgment do not form a part of the decree. The opinion of the court may be and often is given *ore tenus*. The judgment is of necessity a matter of record.

*West Feliciana Railroad* v. *Thornton*, 736.

2. The clerk of the county court properly copied into the exemplification of the record, and certified as a part of it, the decree made in the case by the High Court of Errors and Appeals, and the objection that it is a copy of a copy, is not tenable. Any paper properly made a part of the record in the cause, although in reality a copy, becomes an original for the purpose of making out a transcript of the cause as it appears of record in the court whence it comes. *Ibid.*

BAIL.

See BONDS.

BANKS.

1. The Act of the Legislature of 1852, which relieved the Citizens' Bank from the decree of forfeiture of its charter, while it restored the "rights and privileges" of the corporation, is not to be understood as having restored those of the individual corporators, so as to entitle the original stockholders to a credit at the hands of the Bank, as at present organized, of thirty-three dollars per share, as a loan payable in installments, according to the original charter.

*Pollock* v. *Citizens' Bank*, 228.

2. The Act of the Legislature incorporating the Louisiana Savings Company, was not intended to create a banking institution; it conferred no power to issue notes for circulation, and the laws relative to banking corporations are not applicable to such an institution.

*State* v. *Louisiana Savings Company*, 568.

BANKS (*Continued*).

3. The business of a Savings Company is of such a character that temporary suspension of payment which is almost necessarily connected with its organization, and must have been contemplated by the Legislature, cannot be regarded as an absolute cause of forfeiture. A fraudulent suspension of payment or gross negligence in loaning money without sufficient guaranty by which temporary suspension of payment might ensue, would be different. *Ibid.*

4. From the peculiar nature of the charter of the company, it was *held:* That the closing of the doors, the cessation of business and the temporary suspension of the company for a few days, were not sufficient causes for forfeiture. *Ibid.*

5. It is no part of the duty of a bank to employ counsel, and bring suit upon notes left with it on deposit.

*Crow* v. *Mechanics' and Traders' Bank*, 692.

See CORPORATIONS.

BATTURE.

See NEW ORLEANS—*Remy* v. *2d Municipality*, 500.

BETTING ON ELECTIONS.

1. A Court of Justice will not enforce an obligation where it appears to be nothing more than a bet in disguise on a presidential election.

*Barham* v. *Livingston*, 618.

BILL OF EXCEPTIONS.

See PRACTICE—*State* v. *Judge 2d District*, 113.
See EVIDENCE—*State* v. *Rohfrischt*, 382.
See PRACTICE—*Porche* v. *LeBlanc*, 778.

BILLS AND NOTES.

1. A conditional endorsement does not bind the endorser if the condition be not accomplished. *Johnson* v. *Barrow*, 83.

2. When one has acquired a negotiable note after its maturity, he will, notwithstanding, be protected as an innocent holder if the immediate party who transferred the note to him took it by endorsement *bona fide* for value, before it was due. *Howell* v. *Crane*, 126.

3. The draft sued upon being an instrument *sous seing privé*, and no proof *aliunde* offered of its date, the only date which can be assigned to it is that of its protest. *New Orleans* v. *North*, 205.

4. The plaintiff residing in Missouri sent an endorsed note to *J. J. Anderson & Co.* at St. Louis, with instructions to forward the same for collection to New Orleans, where it was payable. The note was sent to *Corning & Co.*, at New Orleans, who caused it to be protested by a notary for non-payment. The notary, under the instruction of his employers, sent the notice of protest for the endorser to *J. J. Anderson & Co. Held:* That the notary was exonerated from the obligation of giving notice to the endorser. *Moore* v. *Corning*, 256.

5. The agents, *Corning & Co.*, were only bound to give notice of the dishonor of the note to their principals, and could not be held liable to the plaintiff whose interest in the note was not disclosed to them by their principals. *Ibid.*

BILLS AND NOTES (*Continued*).

6. Where one endorses his name on a negotiable note with a space left in blank for the name of the person to whose order it was to be made payable to be afterwards inserted, and the maker sells the note in that condition without the blank space being filled, the holder cannot treat the party who had thus endorsed his name as merely surety and hold him liable without notice of protest. *Weaver* v. *Marvel*, 517.

7. It is not unusual to endorse promissory notes containing blanks to be afterwards filled up so as to make the party an endorser, and the note as to him is to be treated exactly as if it had been filled up before he endorsed it. *Ibid.*

8. Where the consideration of a note due *in presenti* was the acceptance by the plaintiff of the maker's draft payable at twelve months, by which the latter was enabled to purchase property—*Held:* That the maker could not resist payment on the ground that the note was not immediately exigible. *Shannon* v. *Steamer America*, 519.

9. The maker of a promissory note cannot object to the failure of the holder to demand payment at the place of payment, unless he can show that by such failure his funds there deposited to meet his obligation had been lost. *McCalop* v. *Fluker's Heirs*, 551.

10. This action was against the drawers of a draft; one of the grounds of defence was, that it had not been properly presented for acceptance. The notary certified that he "had presented the draft to a clerk of the drawers at their office, the drawers not being in, and demanded acceptance thereof, and was answered that the same would not be accepted." *Held:* That this was a sufficient presentment, the defendants being merchants, having a counting room in New Orleans. *Held, also:* That it is questionable whether the drawer was entitled to notice, as he had no funds in the hands of drawees, and it did not conclusively appear that the agreement with them was such as to authorize the drawer to expect an acceptance. *Whaley* v. *Houston*, 585.

11. If the day on which a draft should, by its terms, be presented, comes on Sunday, it may be presented on the day previous. The court should take notice of the fact, that the date of its maturity is Sunday. *Ibid.*

12. The special endorsee of a bill or note, may disregard all posterior endorsements, even though special, and avail himself of the possession of the instrument to sue the maker. *Alcock* v. *McKain*, 614.

See PRINCIPAL AND SURETY—*Manice* v. *Duncan*, 715.
See EVIDENCE—*Skannel* v. *Taylor*, 773.
See INTEREST—*Hawley* v. *Sloo*, 815.

BONDS.

1. A judicial bond must be construed by reference to the order of court, in pursuance of which it was given. *Mason* v. *Fuller*, 68.

2. When, by a clerical inadvertence, at the time of signing the bond, it was not filled up with the amount fixed as the penalty, but a blank space left for its insertion, the law implies that the bond was given for the sum fixed by the order, and the principal and sureties will be bound thereby for that amount. *Ibid.*

BONDS (*Continued*).

3. When the bond has not been filed it cannot be considered as in evidence, or as produced on the trial. *State* v. *Wilson*, 189.

4. There must be an order of court admitting to bail one charged with murder and fixing the amount of his bond, otherwise the bond taken by the Deputy Sheriff is not binding on the sureties. *State* v. *Cravey*, 224.

5. The surety in an appearance bond cannot be held liable when it does not appear that there was any order of court admitting the accused to bail, fixing the amount of the bail bond, or authorizing the Sheriff to take the same. *State* v. *Smith*, 349.

6. In a bond requiring the accused to appear "when notified," when the Sheriff returns that he could not find the accused after diligent search, and his surety, who was personally notified in time, failed to produce him as he was bound to do, this was sufficient to put the parties in default, and the bond was properly forfeited against both principal and surety. *State* v. *Cole*, 471.

7. An objection that the bond only required the accused to appear and answer the charge of robbery, whereas an information was filed against him for the crime of larceny alone, is sufficiently answered by the fact that the accused bound himself, not only to appear at court to answer that specific charge, but also not to depart thence without leave of the court first obtained. *Ibid.*

8. The insertion of the name of the former instead of the present executive, as the obligee of a bail bond, will be regarded as a mistake, and will not vitiate the bond. *State* v. *McKeown*, 596.

9. Where the Sheriff takes an illegal bail bond, he may abandon it and take another bond. *Ibid.*

10. It cannot be objected to the validity of an appearance bond, that it was taken without authority, where it appears that the Sheriff accepted the bond, and that he was authorized to take and approve it by the court. *Ibid.*

11. A bond given for the appearance of the accused after he had been convicted of larceny is *null*, and the surety on such a bond will be discharged. *State* v. *Vion*, 688.

See DELIVERY BONDS.

BOUNDARY.

1. Plaintiff and defendant had acquired their estates from one common proprietor, the sale to the former was of the most ancient date and was not a sale *per aversionem*—the lower boundary of plaintiff's tract was fixed after the date of the sale to plaintiff. *Held:* That in an action of boundary preference should be given to him whose title was of the most ancient date, unless an adverse possession had produced a difference in the situation of the parties. C. C., Art. 843. *Lacour* v. *Watson*, 214.

2. Although the limits had been fixed, as there was no adverse possession

BOUNDARY (*Continued*).

to defeat the plaintiff's right by prescription, any errors in the operation of fixing the limits could be corrected in a court of justice.

*Ibid.*

3. A survey which starts from certain points and lines not recognized as boundaries by the parties themselves and not shown by the evidence to be true points of departure, cannot be made the basis of a judgment establishing a boundary. *Martin* v. *Breaux*, 689.

4. Parties are not bound by a consent to boundaries which have been fixed under an evident error, unless perhaps by the prescription of thirty years. *Gray* v. *Couvillon*, 730.

BROKER.

See PRINCIPAL AND AGENT—*Soudieu* v. *Faurès*, 746.

CARRIER.

See COMMON CARRIER.

CASES AFFIRMED, OVERRULED, &c.

1. The principles of law involved in this case were settled in the cases of the *State of Louisiana* v. *Judge Burmudez*, 14 La. 478; *same* v. *same*, 2 Rob. 160; *same* v. *same*, 2 Rob. 420; *Succession of Richard Winn*, 3 Rob. 303; *Butler* v. *Her Creditors*, 6 N. S. 625; *E. Gonsoulin et al.* v. *Salvandor Migues et al.*, 5 Ann. 565; C. C. 332.

*Chamberlain* v. *Chamberlain*, 60.

2. The principles of law settled in the case of *Stewart* v. *The City of New Orleans*, 9 An. 461, reaffirmed. *Lewis* v. *New Orleans*, 190.

3. Under that authority, *held*, that the city was not liable in the present case for the nonfeasance or misfeasance of the officers of the police jail.

*Ibid.*

4. Same case, 10th Annual, pages 208 and 792.

*M. S. Hedrick* v. *Bannister*, 373.

5. The ruling of the late Court of Errors and Appeals, that the term felony is unknown to the laws of Louisiana, was an unadvised *dictum*, and is not concurred in by this court. *State* v. *Rohfrischt*, 382.

6. *State* v. *Hendry*, 10 Ann., overruled. *State* v. *Ellis*, 390.

7. The principle as to the liability of common carriers laid down in the case of *Watts* v. *Steamer Saxon*, 11 An. 43, re-affirmed.

*Blocker* v. *Whittenberg*, 410.

8. The decision in the case of *McIntosh* v. *Merchants' and Planters' Insurance Co.*, 9th An. 403, that the guarantee notes belonging to the company were not liable to be seized and sold for the benefit of a single creditor, re-examined and affirmed.

*McIntosh* v. *Merchants' Insurance Co*, 533.

9. The refusal of the court in that and in the present case, to apply the privilege accorded by Art. 722 of the Code of Practice, turns upon the particular facts of these cases, the assets having a peculiar character and destination, rendering it impossible to make them the subject of an ordinary seizure, at the instance of a creditor of the company. *Ibid.*

CASES AFFIRMED, OVERRULED, &c. (*Continued*).

10. The case of *Hemkin* v. *Overly* affirmed, and the cases of *Pierce* v. *Frantum*, 16 L. 422; *Kellum* v. *Rippey*, 3 Rob. 138, and *Williams* v. *Booker*, 12 Rob. 253, so far as inconsistent with the present opinion, overruled. *Gibson* v. *Hutchins*, 545.

11. *Smith* v. *McMicken*, 3 Ann. 321, reaffirmed. *Beauchamp* v. *Cacheré*, 851.

CLERKS OF COURT.

1. Clerks of Court have not the power to grant orders of seizure and sale. *Mason* v. *Fuller*, 68.

2. The power conferred on Clerks of Court (out of the parish of Orleans) to grant orders for the sale of succession property is confined to such orders as are required and asked for by Curators, Administrators and Executors in the regular course of their administration. Such orders cannot be made by the Clerk, at the instance of creditors, to enforce the payment of a debt. *Ibid.*

3. The principles settled in the case of the same plaintiff against *E. B. Fuller*, ante p. 68, as to the power of Clerks of Court in the country to grant orders of sale, are affirmed. *Mason* v. *Hall*, 94.

4. Orders rendered by the Clerk in the special cases authorized by law under the Constitution, have the same effect as they would have, if rendered by the Judge himself *Succession of Boyd*, 611.

5. The Clerk of the District Court tendered his resignation to the Judge of the District, who, thereupon, appointed a clerk *for the remainder of the unexpired term of the clerk who had resigned: Held* that the resignation was properly tendered to the Judge, who is empowered, by Art. 79 of the Constitution, to fill any vacancy that may occur subsequent to an election, and the person so appointed holds his office until the next general election. *State* v. *Morgan*, 712.

6. It is not requisite that the person so appointed by the Judge should be commissioned by the Governor. *Ibid.*

COMMON CARRIER.

1. The common carrier is not required, upon his own responsibility, to decide upon the validity of the title of shippers to property which is shipped, but the shipowner has complied with the law, if he has in good faith received the slave from a person claiming to be owner, and holding under an apparent title. *Farwell* v. *Harris*, 50.

2. The duties which the law imposes on common carriers of passengers by water, in relation to the treatment and accommodation of passengers during the voyage, necessarily cease, on the termination of the voyage. If, during the voyage, a contagious disease breaks out on the vessel, and on her arrival at port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses incured thereby. *New Orleans* v. *Windermere*, 84.

COMMON CARRIER (*Continued*).

3. A merchant in Louisville filled an order on him for merchandize to be shipped to the purchaser at Vicksburg, and took a bill of lading for the same, deliverable to the purchaser at Vicksburg, from the agent of a steamboat on which the goods were to be transported. The goods were taken by drays from Louisville to Portland, to be there received on the boat according to the custom of the trade in low water on the Ohio river. At Portland the goods were delivered to a different boat from the one from which a bill of lading had been taken, and were never delivered to the purchaser at Vicksburg. *Held:* That the bill of lading in such a case is conditional, and only binding in case of actual delivery of the goods to the steamboat. *Fearn* v. *Richardson*, 752.

4. The vendor of the goods did not use ordinary care and diligence in shipping the goods, and the purchaser is entitled to recover back the price paid for them. *Ibid.*

5. The clause in a steamboat's bill of lading reserving the privilege of reshipment, implies an obligation on the part of the boat to reship, if the stage of water in the river does not permit her to prosecute her voyage to her point of destination, and the reshipment is possible; and the additional expense of thus forwarding the goods by another boat, is charged to the boat with which the original contract of affreightment was made, the consignors being bound to pay only the freight specified in the bill of lading. *Hatchett* v. *Steamer Compromise*, 783.

6. Low water is not to be classed among the dangers of the river, excepted in the bill of lading, and which absolve the carrier from his obligation to deliver the goods without unnecessary delay and in good order and condition. *Ibid.*

See CASES AFFIRMED, &c.—*Blocker* v. *Whittenburg*, 410.

COMMUNITY.

1. The wife who had obtained a separation of her property from her husband in his lifetime, in order to exercise the right of accepting the community, is bound, on the death of her husband, to cause an inventory to be made. *Audrich* v. *Lamothe*, 76.

2. The law presumes the acceptance of the community by the wife, when it is dissolved by the death of the husband, but where it had been previously dissolved by a judgment of separation of property, the renunciation by the wife is presumed if, at the death of the husband, she does not cause an inventory to be made. *Ibid.*

3. Notwithstanding such implied renunciation, the concealment by her, or making away with any of the effects of the community, would render her liable as a partner. *Ibid.*

4. The interdiction of the wife for the cause of insanity, is no ground for a decree of separation of property against her in favor of the husband. *Hotard* v. *Hotard*, 145.

5. The community can be dissolved by the husband, only by the effects of the dissolution of the marriage bond, or a separation *a mensa et thoro*, of which a dissolution of the community is the logical sequence. *Ibid.*

COMMUNITY (*Continued*).

6. When the front tract belonged to the husband before marriage, the *double concession* purchased by him after the marriage, under the Act of Congress of June 15th, 1822, became the property of the husband. The only right of the community is that of claiming a reimbursement of the sum paid as the price, if the payment has been made out of the funds of the community. *Succession of Morgan*, 133.

7. The widow has a vested interest in the community property after the death of her husband, but her acceptance of the community will no more take the administration out of the hands of the executor or administrator of her husband's estate than would a like acceptance on the part of the heir. *Succession of McLean*, 222.

8. The administration of the succession of the deceased husband involves with it the administration of the community, and the executor or administrator may rightfully cause the community property to be sold for the purpose of paying the debts of the succession. *Ibid.*

9. The purchaser at a sale thus ordered, acquires all the interest which the widow in community could have had in the property. *Ibid.*

10. When the wife in opposition to a creditor of the husband, in whose favor she had made a formal renunciation, claimed the property mortgaged by him as her separate property—*Held:* that a conveyance of the property to the wife, by act under private signature, not recorded, in which the consideration of the transfer was stated to be a partial payment of the amount due to the wife from her father's succession, without its being shown where the father's succession was opened, or what amount the wife was entitled to inherit, was insufficient to rebut the legal presumption of title in the community. *Wilson* v. *Hendry*, 244.

11. When, during the existence of the community, a stock of goods was bought in the name of the wife but it was not shown that she had been a public merchant, either before or since the sale—*Held:* that the purchase must be considered as having been made by the husband, and the debt incurred by it a debt of the community. *Sarran* v. *Regouffre*. 350.

12. A crop growing at the time of the dissolution of the marriage forms part of the acquets and gains. *Harrell* v. *Harrell*, 549.

13. Where a wife in community takes the title to immovable property in her own name, she must clearly show that it was paid for with her separate funds to rescue it from the community. *Clark* v. *Norwood*, 598.

14. *A. S.* died, leaving a will in which was the following clause: "I will and bequeath to my wife *A. L. S.*, the use of all my property both personal and real, during her life." "However, if any of my children sue for a portion during her life, I then will and bequeath to her all of the property that I can dispose of by will, forever." A child sued for partition, and the question was what were the wife's rights under the will. *Held:* That the husband having made a will, his wife's rights must be fixed by it, and she has no usufruct of his share of the community under the Act of 1844. In the absence of proof to the contrary, the

COMMUNITY (*Continued*).

law presumes a community. After payment of the debts of the succession, the wife is entitled to one-half of the residue in her own right, and her husband having left three children, she is entitled to but one-third of his share of the community, and one-third of his separate estate.

*Grayson* v. *Sandford*, 646.

See HUSBAND AND WIFE—*Wooters* v. *Feeny*, 449.
*Succession of Pratt*, 457.

COMPENSATION.

1. The defendant, who was a private banker, being sued for a cash deposit made with him by the plaintiff, pleaded, by way of reconvention, that he had credited the amount on a protested draft of the plaintiff in his favor for a larger amount. *Held:* That plaintiff and defendant being both residents of New Orleans, and the reconventional demand not being connected with plaintiff's original demand, proof of the reconventional demand was properly rejected. *Morgan* v. *Lathrop*, 257.

2. Conceding the answer to be equivalent to a plea in compensation, the defence could not be sustained, because, under our jurisprudence, as now settled by frequent decisions, compensation does not take place in the confidential contracts arising from irregular deposits of this nature.

*Ibid.*

3. The depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from the depositor, or a course of dealing which will justify such application of the funds. *Ibid.*

4. Compensation takes place between a debtor of a succession and a creditor of one of the heirs, to the extent of the portion of such heir in the debt due to the succession by the individual creditor of such heir, and the heir cannot defeat the compensation by a transfer of his interest in the succession to a third person. *Plunkett* v. *Perkins*, 558.

5. A creditor of the succession has the means of preventing the injurious effects of the compensation as between the heirs and the debtor of the succession, by demanding a separation of patrimony, by taking out letters of administration in proper time, or by enforcing the collection of his claim against the administrator or executor already appointed.

*Ibid.*

6. The knowledge on the part of the judgment debtor, that the notes on which the judgment was obtained were the property of the wife, would not prevent the compensation from taking place at any time while the legal ownership of the judgment remained in the husband.

*Succession of Gilmore*, 562.

7. *S.* purchased property at the succession sale of *F.* and gave his note for the price. *S.* having married *F's* widow, and suit having been brought on the note, he pleaded in compensation the interest of his wife in the community of *F.*—her former husband—and herself. But *held*, that the plea was bad, because the quality of debtor and creditor was not united in the same person, and because, also, the debts were not equally liquidated and demandable. *Stokes* v. *Forman*, 671.

See JUDGMENT—*Crow* v. *Watkin's Heirs*, 845.

COSTS.

See COURTS—*Mussina* v. *Alling*, 799.

CONFLICT OF LAWS.

1. Where a deed was executed in the State of Mississippi in the form adopted in a common law State to create a mortgage there, and real estate situated in Louisiana was embraced in the deed, *Held:* That the instrument must be considered as having but a single aspect, and it was not reasonable to suppose that the parties contemplated a mortgage as to the property situated in Mississippi, and a sale as to the property in Louisiana. *Bernard* v. *Scott*, 489.

2. From the fact that the parties to the deed were both residents in States where the common law prevails, and that the instrument was executed in a common law State in the form of a mortgage, part of the property to be affected by the instrument being situated in that State, it must be considered that it was the intention of the parties to create a mortgage to secure the payment of a sum of money. *Ibid.*

3. When the purchaser of property was fully informed of the title of his vendor, and that he claimed under a deed executed in another State and embracing property situated there as well as in this State, he was bound to enquire what effect the law would give to such a deed. *Ibid.*

4. The character and effect of a deed to slaves, made in Alabama, must be construed by the laws of that State although the parties afterwards remove to Louisiana. *Hollomon* v. *Hollomon*, 607.

5. *H.* in consideration of love and affection, and the further consideration of one dollar, the receipt of which he acknowledged, did give and grant with warranty, to *W. H.*, (his son,) and his heirs and assigns "at the death of *H.* and the wife of *H.*" certain slaves. *Held:* That by the laws of Alabama this was a deed of gift to the son with the reservation of a life estate in the slaves to *H.* and his wife. *Ibid.*

CONSTITUTIONAL LAW.

1. The plaintiffs were not subrogated, either by law or covenant, to the rights and privileges of the "Orleans Navigation Company," which corporation was dissolved by decree of this court in 1852. It is for the party only whose rights have been invaded to plead the nullity of a law as impairing the obligation of a contract. *N. O. Navigation Company* v. *New Orleans*, 364.

2. There is nothing repugnant to the Constitution in the provisions of the Acts of the Legislature of 1813 and 1814, conferring certain powers on the Police Juries in regard to opening natural drains, &c. *Avery* v. *Police Jury of Iberville*, 554.

3. The courts will presume that the power conferred on the Police Jury has been properly and judicously exercised by them, and it is for the party complaining to show that the making or opening of works was unnecessary or detrimental to such party. *Ibid.*

4. The Act of the Legislature of the 25th of April, 1853, since repealed, which declared "that each and every incorporated insurance company,

CONSTITUTIONAL LAW (*Continued*)

and agency of foreign insurance company, *in the city of New Orleans*, shall be taxed five hundred dollars per annum, was in contravention of Article 123 of the Constitution, declaring that taxes should be equal and uniform throughout the State.

*State* v. *Merchants' Insurance Co.*, 802.

5. The fact that the Act provided that the amount of the tax should be paid into the treasury department to be divided equally between the different fire, hose and hook and ladder companies of New Orleans, did not render it a local assessment for local benefit. *Ibid.*

See TAXES—*State* v. *Waples*, 343.
See SUPREME COURT—*State* v. *Judge, &c.*, 405.
See JUDGMENT—*Jacobs* v. *Levy*, 410.
See NEW ORLEANS—*Guillotte* v. *New Orleans*, 432.
*Layton* v. *New Orleans*, 515.
See CRIMINAL LAW—*State* v. *Bass*, 862.

CONSTRUCTION, FOR RULES OF.

See SALE—*Delogny* v. *David*, 30.
See BONDS—*Mason* v. *Fuller*, 68.
See STATUTES—*LaSelle* v. *Whitfield*, 81.
*State* v. *Ellis*, 390.
*State* v. *King*, 393.
See JUDGMENT—*Succession of Regan*, 156.
See WILL—*Fink* v. *Fink*, 301.
*Succession of Thorame*, 384.
See CONFLICT OF LAWS—*Bernard* v. *Scott*, 489
*Hollomon* v. *Hollomon*, 607.
See INSOLVENT PROCEEDINGS—*Rouanet* v. *Castel*, 520.
See TAXES—*State* v. *Winfree*, 643.
See COURTS—*State* v. *Judge of the Ninth District*, 777.
See LAWS—*Saunders* v. *Carroll*, 793.

CONTINUANCE.

1. A continuance was properly refused when the party desiring the testimony of a witness absent in a distant parish, instead of taking out a commission to examine him, dispatched a special messenger to bring the witness; by doing so, he took upon himself the risk of the witness being in court on the trial. *Jeter* v. *Heard*, 3.

CONTRACTS.

1. Courts of justice will not aid parties to enforce or relieve them from the effects of contracts made in violation of law. *State* v. *Reiss*, 166.

2. A contract stipulating a compensation for services to be rendered in procuring an Act to be passed by the Legislature for the relief of the party promising to pay therefor, is *contra bonos mores*, and cannot be enforced, even although no improper means are alleged or shown to have been resorted to by the agent in obtaining the passage of the Act. *Gil* v. *Davis*, 219.

3. In a case of this kind, which is an exception to the general rule, the party himself will be permitted to allege that the contract was contrary to good morals. *Ibid.*

CONTRACTS (*Continued*).

4. Where parties have entered into a contract for building a house and subsequently deviated from it, the contract price should, as far as applicable, indicate the measure of the value of the work done. *Jones* v. *Adams*, 621.

5. Although no sentence of interdiction may have been pronounced, yet it will be sufficient to vitiate a contract if it can be shown that insanity or imbecility of mind has been taken advantage of.
*Holland* v. *Miller*, 624.

6. When the consideration of the assignment of a judgment by *A.* to *B.* was, that *B.* might avail himself of the judgment to compensate certain unmatured notes due by him to *C.*, the judgment debtor, and *B.* promised and undertook to pay the amount of said notes when they become due to *A.* *Held:* That the contract might be enforced by *A.* although the notes were not in his possession. *Christian* v. *Monette*, 635.

7. Where a party is aware of the injury that may result to him from a compliance with his part of the contract, and yet voluntarily enters into it, he cannot afterwards require an indemnifying bond, and if a bond was given at the time of the contract, he can require no other, even if its amount is insufficient to protect him against loss. *Ibid.*

8. If a planter, for a consideration, engages to ship his crop to a factor, and violates his engagements, he will be liable for commissions on the crop.
*Haven* v. *Hudson*, 660.

9. Plaintiff employed *K.*, the defendant, as her overseer, and stipulated that he should receive a portion of the proceeds of the crop as compensation for his services. Plaintiff, on grounds deemed sufficient, dismissed him before his time was up. *Held:* That *K.* was entitled to compensation for the value of his services up to the time of his discharge, and that in estimating the value, reference should be had to the stipulations of the contract; to the probable amount which the defendant would have received, had there been no violation of the contract; and to the probable receipts of the plaintiff, had *K.* discharged his duty in every respect.
*Lambert* v. *King*, 662.

10. An overseer cannot maintain an adverse possession of the plantation against the owner who has hired him. If the owner discharge the overseer without just cause, before the term of his services has expired, the latter has a remedy, under the provisions of the Code in the title of letting and hiring. *Perret* v. *Sanchez*, 687.

11. A resolutory condition is implied in every commutative contract, where either party fails to comply with his obligations; but such contract is not dissolved of right, and the party complaining of its breach may either sue for its dissolution, or demand a specific performance.
*Porche* v. *LeBlanc*, 778.

See ESTOPPEL—*Mourain* v. *Mourain*, 147.
See DAMAGES—*Curtiss* v. *Morehouse*, 649.
See INSANITY—*Chevalier* v. *Whatley*, 651.

COPIES.

See AUTHENTICATION OF RECORD—*W. Feliciana R.R.* v. *Thornton*, 786.

CORPORATIONS.

1. Under the Act of the Legislature of March 15th, 1855, the Governor has authority to appoint a liquidator to take charge of and liquidate the affairs of any corporation, when its charter has been decreed to be forfeited and there is no law existing at the time which provides for its liquidation. *State* v. *Haynes*, 285.

2. The certificate of the secretary of an incorporated company, bearing its seal, affords *prima facie* evidence of the facts therein stated. The court is bound to presume, from such certificate, that legal notice was given to the stockholders of the company of a meeting of which they were entitled to be notified. A special tax was imposed in aid of the corporation, the holders of the tax receipts to become stockholders in the company for the amount thereof. *Held:* That the paymant of the tax does not release the stockholders from the obligations contracted by them under the charter.
*N. O., Jackson and Great Northern Railroad Co.* v. *Lea*, 388.

3. Instalments of the subscription of the stockholders, fixed and required to be paid in by resolutions of the Board of Directors, cannot be regarded as open accounts, and prescribed against as such. *Ibid.*

4. Such instalments may be considered at least as equal to *accounts stated.* *Ibid.*

5. Corporations possess only *jura minorum.* They have not the power of contracting on all subjects, like persons of full age and *sui juris.* Having only such powers as are conferred by their acts of incorporation, they cannot be bound by contracts made by those not authorized to represent them. *Seibrecht* v. *New Orleans*, 496.

6. A corporation cannot be bound for any contract made without its authorization expressed by a resolution of the Common Council. *Ibid.*

7. A stock subscriber who had not paid his five per cent. at the time of subscribing, could not avail himself of the plea that the charter required it to be paid at the time of subscribing, and in default thereof, declared his subscription forfeited—for it was his duty to make the payment, and to sustain such a defence, would be to permit a party to avail himself of his own wrong. *Vicksburg RR.* v. *McKean*, 638.

8. A general printed notice in the newspapers of the dissolution of a copartnership, is not sufficient to bind one who has had dealings therewith; such person is entitled to special notice. Even if special notice is given, accompanied with the notification that certain persons will carry on the business, and settle that of the late commercial firm, these persons will be considered as agents of this firm for the settlement of its indebtedness. *Skannel* v. *Taylor*, 773.

9. Where a creditor of the former partnership drew on those persons (who continued the social style of the late firm) for account of a balance due him by the former partnership, and his drafts are protested for nonpayment, and paid by the drawer *super protest*, a member of the former partnership who is sued for such balance, cannot maintain that there

CORPORATIONS (*Continued*).

was a novation of the debt; the drafts are to be held as having been drawn on his agents by his authority. *Ibid.*

See BANKS.
See EVIDENCE—*Vicksburg RR.* v. *McKean*, 638.
See ACTION—*Bennett* v. *Wheeler*, 768.

COUNTER-LETTER.

See SALE—*Wolf* v. *Wolf*, 529.

COURTS.

1. The court takes judicial knowledge that slaves are personal property in other States. *Farwell* v. *Harris*, 50.

2. District Judges have power to admit the accused to bail, at chambers, without proceeding by *habeas corpus*. An error in the mode of proceeding will not invalidate the decree or the bond taken under it. *State* v. *Wilson*, 189.

3. Courts can enforce only legal obligations and redress injuries to legal rights. *Orr* v. *Home Mutual Ins. Co.*, 255.

4. The court takes judicial cognizance of the signatures of recorders, and when no objection has been made to the introduction of the certificate, it must be held as proving whatever can be reasonably and fairly implied from it. *Scott* v. *Jackson*, 640.

5. The Act of 19th of March, 1857, providing for an interchange between the Judges of the 7th and 9th Districts, intended that, after the elections of April, 1857, those Judges should first hold the regular *seriatim* jury terms, each in his own district, before commencing the interchange. *State* v. *The Judge of the Ninth District*, 777.

6. The meaning of ambiguous words, &c., in a law, may be ascertained by examining and comparing with them the context of the law, and by considering its reason and spirit, and the cause inducing its enactment. C. C. 16, 18. *Ibid.*

7. It is competent for the court to order the plaintiff to furnish security for costs, where the Clerk has neglected to exact such security, or has taken insufficient security. *Mussina* v. *Alling*, 799.

8. The defendant cannot proceed by rule against the security on a bond for costs of suit, but must proceed by an ordinary action. A summary remedy is provided by law for Clerks and Sheriffs against plaintiffs for their costs, and where the plaintiff does not reside in the parish where the suit is instituted, they have the same remedy against the surety for costs. *Ibid.*

See ACTION.
See RECEIVER—*Helme* v. *Littlejohn*, 298.
See CLERKS OF COURT—*State* v. *Morgan*, 712.

CRIMINAL LAW.

1. Any additional instructions desired by the prisoner to be given to the jury, should be prepared and submitted to the court by his counsel. *State* v. *Bogain*, 264.

CRIMINAL LAW (*Continued*).

2. The object of polling a jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors, and the inquiry should be restricted to the question "is this your verdict?" *Ibid.*

3. The prisoner was charged with having committed larceny of the property of *Mary Buckley*. Proof having been adduced that she was a married woman and that the goods stolen were bought by her while residing with her husband, it was *held*, that the Judge should have charged the jury, that all property bought during the existence of the marriage is presumed to belong to the community. *State* v. *Gaffery*, 265.

4. For any larceny committed against the property of the community, the chattels stolen should be alleged to be the property of the community. *Ibid.*

5. Proof that the chattels belonged to the community, will not sustain the charge that the same belonged to the wife. *Ibid.*

6. The presumption of ownership by the husband might be rebutted by the State by showing that the wife was separate in property from her husband, or that the property was bought in her own name by the wife with her paraphernal funds, or that the husband had himself transferred the goods to the wife for the purpose of replacing her paraphernal effects. *Ibid.*

7. Declarations are called "dying declarations" when made under a consciousness of impending death. *State* v. *Scott*, 274.

8. It is not necessary that the declarant should express in direct terms a sense of approaching dissolution; his bodily condition, his appearance, conduct and language, as well as the statements made to him by physicians and other attendants, may be considered and a conclusion deduced therefrom, as to the state of his consciousness at the time. *Ibid.*

9. In a charge of murder, before the jury can convict the defendant, they must believe from the evidence that the deceased died of the wounds inflicted by the accused and *from no other cause*. If he did, the facts that he had no surgeon, or an unskillful one, or a nurse whose ill appliances may have aggravated the original wound, cannot mitigate the crime of the person whose malice caused the death. *Ibid.*

10. To do that, it must plainly appear that the death was caused, not by the wound, but only by the misconduct, malpractice or ill treatment on the part of other persons than the accused. *Ibid.*

11. As the jury in trying an indictment for murder have the power to find the prisoner guilty of manslaughter, it was pertinent and right for the Judge to instruct the jury in the law both of murder and manslaughter, notwithstanding his counsel chose to assert that the only issue for the jury to try was the sanity of the accused. *State* v. *James Patton*, 288.

12. The Judge did not err in refusing to allow the tardy motion for an inquisition of lunacy, there being no pretence that the prisoner had become

CRIMINAL LAW (*Continued*).

insane since the trial, and the question of his sanity at that time having been fully considered and passed upon by the jury as a question of fact. *Ibid.*

13. A verdict in a capital case of "guilty without capital punishment," is justified by the 25th section of the Act of 1855, relative to criminal proceedings. *State* v. *Rohfrischt*, 382.

14. The endorsement of the name of the offence on the indictment, is no part of the finding of the Grand Jury. *Ibid.*

15. In providing against the crime of arson the statute makes no distinction in reference to the ownership of the house, whether belonging to the accused or to a third person. *Ibid.*

16. Where, at request of prisoner's counsel, the Judge charged the jury that they were the judges of the law as well as of the facts, that this was the law of the case and of the State, as decided by the Supreme Court, but added, that in his opinion, it was "bad law"—*Held:* That the accused was not prejudiced by the Judge's expressing his personal opinion against the law. *State* v. *Smelser*, 386.

17. His telling the jury that *this was the law of the case before them*, was equivalent to telling them that his private opinion, in regard to the correctness or policy of the law, should not weigh with them, but they must take the law as expounded by the Supreme Court. *Ibid.*

18. But the charge as given, without qualification, conceded too much to the prisoner, and did not represent accurately the ruling heretofore made by this tribunal upon the point in question. The jury are *not* judges of the law and facts in the same sense. They are exclusively judges of the facts; but of the law only subordinately. They may find a general verdict of guilty or not guilty, and on so doing must pass upon the law as well as the fact. But while they are under no *compulsion* to take the instructions of the court as law, they are expected to apply the law as expounded by the court to the facts which they may find. *Ibid.*

19. The omission of the Judge to charge some matter which may occur to the counsel as favorable to the prisoner, but which the Judge was not asked to give in charge to the jury cannot be regarded as error. *Ibid.*

20. A person present aiding and abetting at the commission of an offence is a principal, and may be punished as such; (overruling the decision in the case of the *State* v. *Hendry*, 10 An., 207.) *State* v. *Ellis*, 390.

21. The repealing clause of the Act of the Legislature of 1855, relative to crimes and offences, repealed the second section of the Act of February 21st, 1828, which made it a crime, punishable with imprisonment at hard labor, "to prepare combustible materials, and put them in any place, with an intention to set fire to a mansion house or other building." *State* v. *Clay*, 431.

CRIMINAL LAW (*Continued*).

22. In the punishment of offences, where the law leaves it to the discretion of the court, the discretion of the court does not extend to the infliction of the penalty of imprisonment at hard labor.

*State* v. *Myhand*, 504.

23. The accused, a slave, was prosecuted under the 6th Section of the Act of 1843, and convicted of stabbing, with intent to kill, one *Smith*, a white man. The Act under which he was indicted, was re-enacted in 1855. (Sess. Acts, p. 50, Sec. 4). The same Statute was re-enacted *verbatim*, by the Act of 19th March, 1857. By Section 43, of the latter Act, it was declared "That all laws, or parts of laws, conflicting with the provisions of this Act, and all laws on the same subject matter, except what is contained in the Civil Code, or Code of Practice, be repealed, and that this Act shall take effect from its passage." (Acts of 1857, p. 234, Sec. 13). The crime charged, was alleged to have been committed anterior to the passage of the Act of 1857. *Held:* That the Statute, under which the slave was prosecuted, was repealed by the Statute of 1857, and that the rule of law is, that when a law is repealed, before the final action of the appellate court, the prosecution must be dismissed.

*State* v *King*, 593.

24. The indictment charged, that the accused, on the 2d day of December, 1855, at &c., "upon the body of one *Adam Lammert*, a free white person, in the peace of the State, then and there being, with a certain dangerous weapon, called a shot gun, then and there loaded with gun powder and divers leaden shot, which the said *John Munco*, then and there, in both his hands, had and held *at* and against the said *Adam Lammert*, feloniously, wilfully and of his malice aforethought, did shoot and discharge with intent, thereby, wilfully and of his malice aforethought, the said *Adam Lammert*, to kill and murder, contrary, &c." *Held:* That, although the indictment does not follow the language of the Statute, yet it sufficiently charges the accused: First, with an assault, by wilfully shooting at *Lammert*, &c. and second, with an assault with an intent, in that manner, to commit murder.

*State* v. *Munco*, 625.

25. Although the word "assault," may not be used, yet when the indictment charges the accused with shooting a gun, at and against another, with intent to commit murder, it will sufficiently imply an assault. *Ibid.*

26. On the trial of the accused, the State offered to prove that *L.* was *struck* with shot: objection was made to the evidence, that "there was no allegation in the indictment that *L.* was shot or wounded." *Held:* That the testimony was admissible. *Ibid.*

27. Where the proof offered in evidence supports the indictment, although it proves a more heinous offence, it is within the discretion of the Judge to receive it. *Ibid.*

28. The District Judge charged the jury "That although death did not ensue from the act, yet the malice aforethought, was equally implied from the act, as though death did ensue." *Held:* The charge is erroneous, because it implies an opinion upon the act proven, which the Judge is now prohibited from giving. *Ibid.*

CRIMINAL LAW (*Continued*).

29. It is not necesaary, on a prosecution for shooting, &c., &c., that it should be shown how the gun was loaded. This may be presumed from all the circumstances. *Ibid.*

30. There is no principle of law which forbids a man who is threatened with violence, or deems it necessary to his personal security, to employ about him persons capable of rendering him efficient assistance in time of need. *Succession of Irwin*, 676.

31. The proceeding against a person for retailing spirituous liquors, without previously obtaining a license, should be by indictment, and not by civil suit. *State* v. *Hollin*, 677.

32. One accused of murder cannot show, as a justification, that the deceased bore the general character of a quarrelsome and vicious man. The effect of testimony, offered by the accused, that a previous quarrel existed between him and the deceased, would tend to aggravate rather than to mitigate the offence. *State* v. *Jackson*, 679.

33. When the accused goes to trial without objection, it will be too late after conviction, to urge, as error, that he had not been served with a copy of the indictment and a list of the jurors who were to try him. *Ibid.*

34. If an imperfect copy of an indictment be served upon the accused, and he consent to go to trial, without insisting upon a perfect copy and the delay accorded to him by law, it will be too late to make the objection after conviction. *Ibid.*

35. In the absence of a bill of exceptions, it will be presumed, that the accused accepted the jurors who tried his case, and it will be too late to object after verdict. *Ibid.*

36. The information charged that the prisoner on, &c., at, &c., "with a certain dangerous weapon, to wit: a pistol, in and upon one *Thomas Martin*, did make an assault, by wilfully shooting at him with the intent, him the said *Thomas Murtin*, then and there to kill and murder." There was endorsed on the information the words "Information with intent to kill," which formula was repeated by the clerk in the entry on the minutes of the court. *Held:* That the mistake of the clerk neither enlarged nor reduced, nor violated the authentic accusation contained in the body of the information on which the prisoner had been arraigned and pleaded not guilty. *State* v. *McGinnis*, 743.

37. The verdict of guilty, found by the jury, was properly followed by a sentence against the prisoner for the offence charged in the body of the information. The minor offence of "an assault with intent to kill," endorsed in the information, was not the offence for which he should have been punished. *Ibid.*

38. The Act of March 9th, 1855, "to provide for the trial of slaves accused of capital crimes in the parish of Orleans," was not repealed by the Act of 19th March, 1857, "relative to slaves." The Acts are not upon the same "subject matter." The former is a local law providing a local tribunal for certain specified cases; the latter is a general law applicable

CRIMINAL LAW (*Continued*).

to the State at large, and the rule is, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent. *State* v. *Kitty*, 805.

39. The Act of 19th March, 1857, "relative to slaves," repeals all laws, so far as the offences of slaves, specially made such by statutes relative to slaves, alone, are concerned, for the former Act contains no clause saving pending prosecutions or providing for the punishment of persons who had committed crimes under the repealed laws. *Ibid.*

40. The word "whoever," in the Act of 14th March, 1855, "relative to crimes and offences," as used in the first section thereof, comprehends slaves considered as persons, as well as free men. And slaves, in our law, when held to answer for offences, are treated as persons, and may be punished under the general laws relative to crimes and offences, as well as under special statutes framed exclusively for that class of our population. *Ibid.*

41. The accused had made certain statements as to his guilt to *B.* *Held:* that the District Judge did not err in permitting the statements of the accused to *B.* to go to the jury when the facts embraced therein had been corroborated by evidence *aliunde*. *State* v. *Hash*, 895.

42. Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, *if the Court believes*, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. *In the absence of any such circumstances* the influence of the motives, proved to have been offered, will be presumed to continue and to have produced the confession, unless the contrary be shown, and the confession will therefore be rejected. *Ibid.*

43. The Act of the Legislature empowering the Judge to appoint an Attorney to prosecute in behalf of the State (*pro tempore*), when the District Attorney shall not attend, is not unconstitutional. *State* v. *Bass*, 862.

44. In all criminal cases as well as civil cases, a written assignment of errors must be filed, in conformity to Art. 897 of the Code of Practice. *Ibid.*

45. If the assignment is not filed before the cause is submitted the right to file it is waived. *Ibid.*

See JURY—*State* v. *Populus*, 710.
See EVIDENCE—*State* v. *Kitty*, 805.

CURATOR.

See EXECUTORS.

DAMAGES.

1. The city is responsible for damages occasioned by the tortious acts of municipal officers, done within the scope of their employment and ratified by their superiors. *Wilde* v. *New Orleans*, 15.

2. In such a case, when the evidence is unsatisfactory as to the amount of damages, and the property of the use of which the plaintiff had been deprived, is of trifling value, only nominal damages will be awarded. *Ibid.*

DAMAGES (*Continued*).

3. In an action against the owners of a ship for the value of a slave carried away in the ship, the plaintiff, under the general denial, is bound to prove that he is the owner of the slave carried away.
*Farwell* v. *Harris*, 50.

4. It is a good defence to such an action, that another person than the plaintiff is the owner of the slave, and that the defendant was authorized and employed by such other person to receive the slave and carry him to another port. *Ibid.*

5. When the consignees of the ship have paid the contribution imposed by the Statute as hospital money, and the act of introducing the passengers is not in violation of any prohibitory law, an action for damages arising from a *quasi offence* will not lie. *New Orleans* v. *Windermere*, 84.

6. Damages incident to the institution of a suit for the recovery of any civil right cannot, as a general rule, be recovered upon a demand in reconvention. *Knox* v. *Thompson*, 114.

7. In an action by an overseer for his wages, a plea in reconvention may be set up by the defendant, claiming damages for the unlawful killing of one of the negroes by the overseer. *Miller* v. *Stewart*, 170.

8. An overseer is not permitted to chastise the slaves of his employer with unusual rigor, nor to maim or mutilate them, or to expose them to the danger of loss of life. *Ibid.*

9. A recovery against and payment by either of two persons severally bound therefor, of the value of a slave unlawfully carried away, vests the title to the slave in the one from whom the damages were claimed and received. *Owen* v. *Brown*, 172.

10. Counsel fees in the suit to annul the judgment and enjoin its execution were properly disallowed to the plaintiff as damages.
*Flynn* v. *Rhodes*, 239.

11. Insurance companies cannot be made liable in an action for damages, for having conspired and agreed with each other that they would not insure any boat in which a particular person should be employed, in order to prevent that person from obtaining employment.
*Orr* v. *Home Mutual Insurance Co.*, 255.

12. The defendants had the right, separately or acting in concert, to decline taking any risk in any boat on which the plaintiff should be employed as master. *Ibid.*

13. In an action for damages for malicious arrest, the following instructions to the jury were asked by the defendant: "That the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution, and that the defendant is not bound to prove probable cause until the plaintiff has shown the absence of it, and that if the plaintiff show malice and not the want of probable cause, the defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice, before a recovery can be had." *Held:* that the charge asked for was proper, and should have been given to the jury. *Barton* v. *Kavanaugh*, 332.

DAMAGES (*Continued*).

14. Where a person maliciously and without probable cause procures the arrest of another, the error of the magistrate in ordering the arrest on an affidavit which charged no act or offence punishable by law, will not absolve the party procuring the arrest. *Ibid.*

15. The court did not err in declining to instruct the jury that the mere belief of the affiant in the truth of the charges would exonerate him, but it would have been proper to instruct the jury that "probable cause does not depend upon the actual state of the case in point of fact, but upon the *honest and reasonable belief* of the party prosecuting *Ibid.*

16. Evidence of malice on the part of the defendant towards other persons than the complaining parties is inadmissible. *Ibid.*

17. Damages will not be allowed for delay when no time was specified in the contract within which the work was to be completed.
*Ferguson* v. *Millaudon*, 348.

18. Where goods are injured on shipboard the measure of damages is the difference between their value in their damaged state, and their value at the port of destination if they had been delivered in good order, which should be ascertained by a public sale to the highest bidder.
*Henderson* v. *Maid of Orleans*, 352.

19. Where a runaway slave is received on board ship by an imposition practiced on the officers by a forged pass and calculated to deceive, and it is clear from the evidence that the officers were actually deceived thereby, the owner recovering such slave is not entitled to damages from the master of the vessel on account of the deterioration in value of the slave by his running away; this viciousness of character was manifested before he was received on board the ship by his running away and procuring the forged pass. *Daret* v. *Gray*, 394.

20. Masters of ships and other vessels being prohibited, by the third section of the Act of 1816, from transporting or attempting to transport any negro, mulatto or other person of color, from New Orleans, *under any pretence whatsoever*, without the observance of certain prescribed formalities, the failure by the officers of the ship to conform to the requirements of the law, will make the master liable for the reasonable expenses of the owner in recovering his slave, and this on general principles as well as by the terms of the fourth section of the Act of 1816. *Ibid.*

21. The master of a ship is bound to third persons, both by the commercial law and this statute, for the acts of all persons under, or supposed to be under, his command, while engaged about their ordinary duties as subordinate officers of the ship or seamen. *Ibid.*

22. A judgment rendered against two or more parties for damages, arising from the fault or negligence of the defendants, cannot be for different amounts; for they are bound *in solido* for the injury under the Act of 1844, (p. 14,) and the amount of damages for which one party is bound is the measure of damages for the other also. The payment of the damages by the one is the discharge of the other from the same obligation. C. C. 2130. *Howe* v. *New Orleans*, 481.

DAMAGES (*Continued*).

23. Nuisances may exist in the city without rendering the same liable for the consequences. *Ibid.*

24. The city is no general warrantor against the acts of individuals. *Ibid.*

25. The city at large cannot be held responsible for acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented. *Ibid.*

26. Any citizen aggrieved by a public nuisance, is entitled to an action of damages against the offending party, especially if such nuisance involves also the breach of a private warranty.
*Bruning* v. *New Orleans Canal Co.*, 541.

27. This was an action for damages. The jury found for the defendant, although the court did not consider the defendant free from blame, yet, in affirming the verdict, much stress is laid on the fact that plaintiff had not only acted in a manner grossly improper, but in palpable violation of law. *Clement* v. *Wafer*, 599.

28. Plaintiffs claiming to have a charter of the Louisiana Legislature to construct a turnpike road from Point Pleasant, in the parish of Morehouse, to Bœuf River, in the same parish, alleged that the police jury of Morehouse had opened a road running some distance, parallel with their turnpike, and intersecting it at one point, thus diverting travellers from the turnpike and inflicting heavy damages in the way of loss of tolls. The action was for damages against the police jury. *Held:* The charter of the plaintiffs does not deprive the parish of the prerogative of making other public roads from other points even if these roads should cause a diminution of plaintiffs' receipts.
*Curtis* v. *Parish of Morehouse*, 649.

29. Two members of a patrol company while on duty hailed a slave, at night, who was riding into a village. The slave attempted to escape, whereupon the patrol fired on him, and inflicted wounds of which he died. In an action by the master, against the patrol who shot his slave, for damages—*Held:* That the plaintiff could not under the circumstances of the case, recover. *Duperier* v. *Dautrive*, 664.

30. Where it appears that the plaintiff, in obtaining a writ of arrest, acted in good faith and upon an apparent cause of action, in some degree, arising from defendant's own conduct and declarations, he ought not to be condemned to pay damages. Nor are the jury at liberty in assessing damages to estimate the traveling expenses and loss of time of defendant in preparing his defence and attending court. In the eye of the law the expenses of a suit which a party incurs, are, as a general rule, considered as covered by the taxed costs. *Osborne* v. *Moore*, 714.

31. Damages refused to a builder against whom an injunction has been sued out, where the whole foundation of his claim for damages is a supposed hindrance thrown in his way in executing a building contract which confessedly required for its execution the use of a side wall erected by the plaintiff in the injunction, and for which he has not been compensated.
*Jamison* v. *Duncan*, 785.

DAMAGES (*Continued*).

32. The courts should restrain within reasonable bounds, the infliction of pecuniary penalties against a party who has only attempted to pursue what he in good faith supposed to be his legal rights, according to the forms of law. *Ibid.*

33. By a contract made in Alabama, and which was not recorded in Louisiana, defendant put it in the power of *W.* so to act, that an innocent purchaser in Louisiana might be deceived and defrauded. Plaintiff was deceived and purchased in good faith a slave, which the defendant, without plaintiff's consent, afterwards got possession of and carried away—defendant was condemned to return the slave or to pay his value in damages. *Lowber* v. *McCoy*, 795.

34. Where it appeared that defendants had sold the barge that plaintiffs illegally attached—*Held:* That defendants could not maintain an action of damages for loss of freight, by reason of the illegal seizure. *Watts* v. *Shropshire*, 797.

35. No remedy is given by statute against a parish for a private injury caused by the absence of bridges or a neglect to keep them in repair. *King* v. *Police Jury of St. Landry*, 858.

36. Where it was not shown that the Police Jury of the parish were under a legal obligation to keep the bridge over a certain water course always in repair—*Held:* They were not liable for damages occasioned by the ruinous condition of the bridge. *Ibid.*

37. In the jurisprudence of Louisiana a distinction is not made between words actionable and words not actionable as the basis of damages in a suit for slander where no special damages are proved. *Feray* v. *Foote*, 894.

See MALICIOUS PROSECUTION—*McCormick* v. *Conway*, 53.
See INJUNCTION—*McRae* v. *Brown*, 181.
See PUBLIC LANDS—*Gibson* v. *Hutchins*, 545.

DEFAULT.

See SALE—*Harris* v. *Harris*, 10.

DELIVERY BOND.

1. The defendant, whose property has been seized under an execution, and who has given a delivery bond under the Act of 1842, (Rev. Stat., p. 528, Sec. 5,) may make a valid sale of the property. The judgment creditor cannot seize the property in the hands of the vendee; his remedy is against the parties to the bond. And when the sheriff has declared the bond forfeited, subsequent seizing creditors cannot complain of informalities in the declaration of forfeiture. It is an answer to them to say that the bond was rightfully forfeited. *Brander* v. *Bobo*, 616.

DEPOSIT.

1. The mere designation of the Recorder's office, as the place where the note is to be paid, does not authorize the payment of it to the Recorder himself. *Aguilar* v. *Bourgeois*, 122.

2. Without a special authority to the Recorder to collect it, the money left with him is to be considered a deposit and at the risk of the depositor.

DEPOSIT (*Continued*).

The fact that the creditor endeavored to collect from the Recorder the money which had thus been deposited for him does not imply that he considered the deposit as a payment, nor bar his recovery from the debtor. *Ibid.*

DEPOSITIONS.

1. When the return day mentioned in a commission for taking testimony has expired, testimony taken under it is taken without authority and cannot be received. *Wiggins* v. *Guier*, 177.

2. An order extending the return day, made after it had already expired, would not render testimony admissible which had been taken without authority. *Ibid.*

3. A public officer ought not to be permitted to testify as to the contents of documents in his office, without annexing copies of such documents to his deposition. The witness may annex to his answers the entries made in books and explanation of erasures. *Ibid.*

4. Where the answers of a witness to cross-interrogatories are imperfect and evasive, the deposition cannot be rejected on that account. The objection goes to the credibility of the witness alone, if all the cross-interrogatories have been answered. *Lurty* v. *Maryman*, 180.

See WITNESS—*Delee* v. *Sandel*, 208.

DEPUTIES.

See SHERIFF—*State* v. *Wilson*, 189.

DERELICT PROPERTY.

1. Property sunk in a steamboat and unclaimed for twenty-three years held to be clearly derelict. *Creevy* v. *Breedlove*, 745.

DIVORCE.

1. In cross-actions brought by husband and wife for a separation from bed and board it was *Held:* That where the faults of the parties are nearly balanced, and are of a similar nature, neither party can be heard to complain in a court of justice. *Trowbridge* v. *Carlin*, 882.

2. Under the law of Louisiana, as hitherto interpreted, disappointments in the marriage relation, and mere incompatibility of temper, are not causes for a judicial separation between husband and wife—excesses, outrages and cruel treatment of a nature to render the conjugal life intolerable, are; but with the qualification, that the party complaining must be comparatively innocent. Mutual insults and outrages, the fruit of mutual provocations, unless there be a great and palpable disproportion of guilt, as between the parties, furnish no sufficient ground of action to either. *Ibid.*

DOMICIL.

1. The Acts of the Legislature, approved March 7th, 1816, and March 16th, 1818, pointing out the manner of obtaining residence within the State, related to the acquisition of political rights. *Winter Iron Works* v. *Toy*, 200.

DOMICIL (*Continued*).

2. They prescribed conditions on which a political domicil could be acquired. *Ibid.*

3. A person who actually lives in the State, *animo manendi*, must be sued personally. He cannot be brought into court by attachment, because he has occasionally gone out of the State, for temporary purposes, in each year since he came to the State to live. *Ibid.*

DONATIONS.

1. A donation *inter vivos*, in which the donor makes a reservation in favor of himself of an annuity sufficient for his subsistence according to his previous habits and condition in life, is not a donation "*omnium bonorum*," prohibited by Article 1484 of the Civil Code. *Bourgeat* v. *Dumoulin*, 204.

2. With a view to emancipate her slave, *A.* passed an act of sale of him to *B.*, *B.* attempted, but failed, to effect his emancipation, and offered to return him to *A.*, who refused to receive him, and abandoned him to *B.* The heirs of *A.* sued *B.* to recover the slave, but, under the facts of the case, the court maintained the title of *B.* *Sémère* v. *Sémère*, 681.

3. A donation of a slave with the reservation of the usufruct to the donor, during his life, is radically null. *Carmouche* v. *Carmouche*, 721.

See WILLS.

ELECTIONS.

1. Whatever may have been the authority of a Commissioner of Election to inquire into the evidence of citizenship of a voter, prior to the passage of the Act approved the 20th of March, 1856, entitled "an Act providing for the registry of the names and residence of all the qualified electors of the city of New Orleans, according to Article eleventh of the Constitution of the State," he has no such power as the law now stands. *Auld* v. *Walton*, 129.

2. By the said Act of March 20th, 1856, an officer is created having authority to receive and consider the proof of citizenship of any person desirous of exercising the elective franchise in New Orleans, and proof being made according to certain rules and forms of evidence set forth in the statute to enregister the name of the applicant as a qualified elector, and to deliver him a certificate. *Ibid.*

3. This certificate is, by law, full proof of the right to vote at the day of its date of the person named in it, and no person can vote in New Orleans who is not the bearer of a certificate of registry. *Ibid.*

4. The office of Register, under the statute, is a special tribunal for the trial of the right to vote in New Orleans; and the certificate is in the nature of a judgment, which is not subject to revision by the Commissioners of Election. *Ibid.*

5. These judgments of the Register are, however, subject to revision. The 9th section of the Act provides a mode of redress, by a suit against the Register, by an applicant to whom the Register shall refuse a certificate. And the validity of the certificate, and the sufficiency of the proof upon which it was based, may in all cases be examined upon the contest of an election, by the tribunals seized of the jurisdiction of such contest. *Ibid.*

ELECTIONS (*Continued*).

6. Where the registry of a vote is more than three months old, and there is no change of domicil endorsed upon the certificate, the vote may be challenged upon the ground that the voter has changed his domicil since the date of registry, and by such change of domicil has lost his vote in that precinct. Upon such challenge being made, the Commissioners of Election may lawfully swear the voter as to the fact of his change of domicil. *Ibid.*

7. The statute under which plaintiff contests the election of defendant as Judge of the Fifth District of New Orleans, required him to set forth *specially all the grounds of contest;* if on account of the alleged violation of a particular law, he ought to have specified what provisions of such law were violated. *Augustin* v. *Eggleston*, 366.

8. The mere position of the ballot-box will not make an election null and void without any resulting injury. *Ibid.*

9. Elections are to be determined by the majority of the ballots cast, and are not to be set aside on account of the meagreness of the vote, without distinct and circumstantial allegations of error, fraud, violence, or illegality *affecting the result.* *Ibid.*

See BETTING—*Barham* v. *Livingston*, 618
See CLERKS OF COURT—*State* v *Morgan*, 712.
See SHERIFF—*State* v. *Hyams*, 719.

EMANCIPATION.

1. The plaintiff was the slave of a citizen of Louisiana, by whose formal act and consent she was emancipated, in the year 1839, in the State of Ohio, where she was carried for that purpose. She subsequently returned to Louisiana and has been residing here since as a free person of color, her former master also residing here. *Held:* That she did not forfeit her freedom thus acquired abroad, by returning to the State. Such penalty is not imposed upon free persons of color for returning to the State in contravention of law. The Act of the Legislature in 1846 does not prohibit an *express* emancipation of a slave in a foreign State by a master resident in Louisiana. It only guards against manumission being implied from the mere fact that the slave, whether with or without the consent of the master, has been upon the soil of a territory where slavery is prohibited. *Barclay* v. *Sewell*, 262.

See WILLS—*Turner* v. *Smith*, 417.

ESTOPPEL.

1. When the wife by the marriage contract constituted to herself as dowry certain slaves, and her father became a party to the contract and signed it, he is estopped from contesting his daughter's title to the slaves. *Mourain* v. *Mourain*, 147.

2. Where a party is present at a sale of property by the Sheriff, and does not notify the persons present, nor the purchaser, of his rights, he cannot afterwards set up a claim to the property. *Gottschalk* v. *De Santos*, 473.

3. Where a party, whose property was sold under an order of seizure and sale, was present at the sale and bid himself for the property, he is es-

ESTOPPEL (*Contined*).

topped from contesting the validity of the sale on merely formal grounds which were obvious to him at the date of the sale.

*Mullen* v. *Follain*, 888.

4. If the advertisement of the sale was defective in not describing particularly the buildings, he should have objected to the sale and not enticed other persons into bidding. *Ibid.*

EVIDENCE.

1. The bare fact that *A.* handed a certain sum of money to *B.* unexplained will not authorize *A.* to recover it back, on the allegation that it was a loan; it is the presumptive evidence of either the payment of an antecedent debt or of a gift. *Rohrbacker* v. *Schilling*, 17.

2. A copy of a sale or deed of conveyance made and executed by any Sheriff in this State, certified to be a correct copy by the Clerk, has the same effect as evidence in every respect as a duly certified copy of an authentic act. *Massey* v. *Hackett*, 54.

3. Parol evidence is inadmissible either to create or to destroy title to real estate. *Ibid.*

4. A witness can only refer to memoranda made by himself to refresh his memory. *Ibid.*

5. The fact that the party against whom evidence is offered of the contents of a deed is in possession of the instrument does not authorize secondary evidence to prove the contents of it, without first giving him an opportunity of producing the original. *Williams* v. *Benton*, 91.

6. Where the true agreement between the parties in relation to the transfer of real estate, can only be arrived at by consulting parol evidence which is inadmissible, a title cannot be established. *Heiss* v. *Cronan*, 213.

7. When the only subscribing witness to an act of sale is dead, and after diligent search and inquiry no one can be found who is acquainted with the signature or place of residence of the vendor, proof of the genuineness of the signature of the subscribing witness will be sufficient proof of the execution of the instrument *McGowan* v. *Laughlin*, 242.

8. The ownership of real estate can only be established by a written title. *Boyle* v. *Succession of Leitch*, 261.

9. When an instrument offered in evidence is not objected to, any indorsement on it is considered as proved. *Bell* v. *Keefe*, 340.

10. The judicial acts of a court of record are evidenced by the record alone. *Ferguson* v. *Millaudon*, 348.

11. Parol evidence was improperly admitted to show that a verbal order had been given in open court to take a bond. *Ibid.*

12. Where the book-keeper of a commission merchant, offered as a witness to prove his accounts, swears to their correctness, but it appears, on cross-examination, that he made no original entries on the day book, cash book and invoice book—saw none of the goods purchased, and only knows that "he kept the ledger correctly from the entries furnished him by the partners and other clerks." *Held:* That the proof

EVIDENCE (*Continued*).

was insufficient. The clerks who made purchases for defendant ought to have been examined, and the drafts and receipts ought to have been produced. *White* v. *Wilkinson*, 359.

13. The presumption created by the Act of 1840 that slaves found on ships, steamboats or other vessels, without the consent in writing of the owner, were received on board with the intention of depriving their masters of them, is liable to be destroyed by the testimony of at least two witnesses, not employed on board, and corroborating circumstances. *Barry* v. *Kimball*, 372.

14. The circumstance of plaintiff having suffered more than four years to elapse from the maturity of the due-bill held by him before he put it in suit, combined with the fact of a settlement made in the meantime between the parties, which purported to be in full of all demands, is sufficient to throw upon the plaintiff the *onus* of proving that the consideration of the due-bill was something distinct from the credit allowed him in the settlement in question. *Hedrick* v. *Bannister*, 373.

15 Where testimony had been given without objection, as shown by the bill of exceptions, and its exclusion had, therefore, become impossible, the Jury being already in possession of it. *Held:* That a motion to exclude such testimony was unmeaning and was properly overruled. *State* v. *Rohfrischt*, 382.

16. The Judge *a quo* did not err in admitting evidence that another and different firing of the premises had taken place three or four weeks previously to the firing charged in the indictment, and under circumstances tending to throw suspicion on the defendants of the same crime they are now charged with, and of which testimony had already been offered to the Jury. *Ibid.*

17. It is competent for the State to prove by a witness that the defendant had offered such witness a bribe to swear falsely that certain other witnesses who had testified on part of the State, had threatened to burn defendants' house the day before the fire testified to by them. It is not a sufficient objection to such evidence, that the defendant had not introduced any testimony. The evidence objected to did not purport to rebut or discredit any evidence which it was anticipated the accused were about to offer. *Ibid.*

18. The copy of a sale under private signature, introduced in evidence for the purpose of proving its registry, has no effect without the original. *Knight* v. *Knight*, 396.

19. The certificate of the Register of Births and Deaths for the Parish of Orleans is a legal document, creating of itself a *prima facie* presumption of the death of a party. *Succession of Jones*, 397.

19. Proof of verbal acknowledgments of indebtedness is not entitled to much weight, particularly after the death of the person who is alleged to have made them. *Succession of Celeste Croizet*, 401.

20. Where a minor arrived at the age of majority gives a receipt to his tutor, the receipt is not conclusive against him, and the fact which it recites may be contradicted by oral testimony. *Ibid.*

EVIDENCE (*Continued*).

21. The *lex fori* governs the admissibility and effect of evidence.
*Blocker* v. *Whittenburg*, 410.

22. The family Bible being produced as evidence to show that a party to judicial proceedings was a minor when they took place, it appeared that a blank had been left for the date of his birth, which was filled up *in pencil;* it also appeared that the Bible, instead of being kept as a record of events at the time of their occurrence, contained several entries made with the same pen and ink, and apparently at the same time. *Held:* That as the witnesses, after a lapse of fifty-one years, could not refer to any distinct positive fact occurring at the time, by which the date could be satisfactorily fixed, the testimony was not sufficient to set aside proceedings which had been acted upon and tacitly acquiesced in for nearly thirty years. *Greenwood* v. *The City of New Orleans*, 426.

23. The plaintiffs in a petitory action claimed to have derived their title by inheritance from their grandmother, who they alleged inherited the property from her husband, *Thomas Bally*, who died intestate. The instructions to the jury were: "*That it was sufficient for the plaintiffs, in default of affirmative proof, showing that Thomas Bally died without leaving any ascendants, to show that one hundred years had elapsed between the birth of the nearest ascendant of said Thomas Bally and the institution of this suit. That in order to ascertain whether one hundred years had elapsed from the birth of such ascendant to the time of the institution of this suit, it was sufficient for the jury to take into consideration the age of the witness, the length of time since the death of Thomas Bally, his age when he died, and the age that his father must necessarily have been at the time of the birth of Thomas Bally, and that no direct proof of the time of the birth of the father or other ascendant of Thomas Bally was required.*" It was *held* that the charge was substantially correct. It suffices to deny that there are heirs in the descending line, and this being a negative, no proof need be given of it. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years had elapsed since the death, in which case death is presumed, and not before. *Miller* v. *McElwee*, 476.

24. It was also *held* that the lapse of one hundred years from the birth of *Thomas Bally's* ascendants to the date of the institution of this suit, was sufficient presumptive evidence to establish that they were not in existence at the death of *Thomas Bally*, the controversy being one between the heirs of *Thomas Bally's wife* and the defendant claiming without any title whatever. *Ibid.*

25. In cases where a sale or transfer of property is attacked, upon the grounds of alleged fraud and simulation, the defendant is not bound to produce proof of his good faith and the reality of the sale, when the property did not remain in the possession of his vendor. The *onus* of proving it is on the part of plaintiff, who alleges the fraud.
*Martin* v. *Drumm*, 494.

26. The court did not err in excluding the opinion of the Civil Engineer as to whether the right fork of a bayou was a natural outlet, or caused by

EVIDENCE (*Continued*).

a crevasse, or some sudden eruption of nature. Whether it was caused by a crevasse or some sudden eruption of nature, it was not artificial.
*Avery* v. *Police Jury*, 534.

27. As a general rule, an executor who endorses a bill or note, although he does so as executor, is personally bound; he is therefore, incompetent as a witness to fix a liability on a prior party to it.
*Leverich* v. *Bossier*, 583.

28. To enable a party to introduce secondary evidence of the contents of a lost instrument, it will be sufficient if it appear, from all the evidence, that the loss was advertised and the proper exertions made to recover it. *Peace* v. *Head*, 582.

29. Alleged co-trespassers, who have been sued in another parish for the same cause of action, may be received to testify on behalf of a defendant charged also, as a co-trespasser: his position may possibly affect his credibility, but not his competency. *Clement* v. *Wafer*, 599.

30. Parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, including error on his own part when he subscribed. *Vicksburg Railroad* v. *McKean*, 658.

31. The Act incorporating the Vicksburg, Shreveport and Texas Railroad Company, required the company to commence the work in sections as nearly simultaneously as may be, and pointed out where the sections should begin, and in what direction the work should be carried on. It contained a proviso that the stock subscribers in each parish or corporation, or a majority in amount should have the right to designate on what section of the road they desired their stock subscriptions to be used. Defendant, when sued for his stock subscription, offered to prove that the company had abandoned the idea of working on one section, and had determined to appropriate the funds of the company to work another section. *Held:* That the evidence was properly rejected, for the defence set up could not avail defendant. *Ibid.*

32. Remarks made by a slave, in conversation—he being incompetent to testify—and consisting merely of a detailed narrative of a past occurence, should not be received in evidence, as forming part of the *res gestæ*.
*Duperrier* v. *Dautrive*, 664.

33. A judgment against the principal debtor is *prima facie* proof of the amount for which the surety on an administrator's bond is liable, and until rebutted by sufficient evidence, no other proof is required.
*Ferguson* v. *Glaze*, 667.

34. Neither the principal nor his surety can introduce parol evidence to vary a written contract. *Ibid.*

35. A party who offers proof, that would be inadmissible under our law, of a contract said to have taken place in another State, must show that such proof would be admissible, to prove the contract, in the State where it took place. *Gautt* v. *Gautt*, 673.

EVIDENCE (*Continued*).

36. The Auditor's account, charging a delinquent tax collector with the amount of his defalcation, is sufficient evidence to establish the liability of the surety on the collector's bond. *State* v. *McDonnell*, 741.

37. The written admission of a party of the fact that he had made a verbal sale of a slave to another, is primary evidence, and makes legal proof of title to the property. *Bair* v. *Abrams*, 753.

38. Where the relevancy or competency of the evidence offered by a party on the trial of a cause cannot be judged of without knowing the purpose for which it was offered, and it does not appear by the bill of exceptions to the rejection of the evidence, that the party offering it was prejudiced by its rejection, the action of the lower court will not be reversed. *Succession of Pasquier*, 758.

39. Where the evidence offered is apparently foreign to the case, the party offering it must show that it would be rendered material by other evidence which he undertook to produce. *Ibid.*

40. Entries made by a Clerk in his employer's books, are *prima facie* evidence in favor of the former against the latter, when it is shown that the books were annually examined by the employer and that balance-sheets were semi-annually furnished to him, which embraced the disputed items. *Rayne* v. *Taylor*, 765.

41. The possession of protested drafts by the drawer is *prima facie* evidence of their payment by him. *Skannel* v. *Taylor*, 773.

42. A merchant's books are not evidence in his favor; nor can they be used as such by his creditors to establish a debt claimed as being due to him, especially where no fraud or collusion between the merchant and his alleged debtor is charged or proved; nor can a partner be received as a witness to prove a debt due to the partnership. *Porche* v. *LeBlanc*, 778.

43. Art. 2260, C. C., must be construed as applicable to cases in which the interest of an ascendant or descendant of the witness is directly involved. *Ibid.*

44. The lack of full and explicit pleadings, will not compel the rejection of pertinent evidence, the existence of which was previously known to the party objecting to its introduction. *Lowber* v. *McCoy*, 795.

45. The voluntary statements of the prisoner before accusation received against her. *State* v. *Kitty*, 805.

46. In cases requiring proof of dates of delivery of a great variety of articles, &c., a memorandum, made at the time, may be referred to by a witness, because of the difficulty, and often impossibility, of making the proof with certainty without such reference. *Davidson* v. *Lallande*, 826.

47. Where a plantation, slaves, &c., were sold at public auction, testimony offered by the purchaser to establish his claim to certain articles alleged by him to have formed a part of his purchase, was properly excluded on the objection, that they were not embraced either in the printed advertisement or in the inventory read at the sale. *Ibid.*

EVIDENCE (*Continued*).

48. A plat of survey purporting to be an extract from an approved map of a particular township, certified by the Register of the Land Office is inadmissible as evidence, it being only the copy of a copy and therefore not the best evidence. *Lawrence* v. *Grout*, 835.

49. Evidence may be received to show that a note which was given by the former tutor of a minor, in his own name, was in fact signed by him in his capacity of tutor, and that the consideration was a debt due by the minor. Such testimony does not contradict any part of the note, and will authorize a judgment on the note against another tutor to the minor subsequently appointed. *Leonard* v. *Hudson*, 840.

50. Where the contract in relation to movables embraced in a sale was in writing—*Held:* That the vendee could not be permitted to prove by parol, that it was the intention of the parties certain articles not designated should be included in the sale, unless he has alleged mistakes or fraudulent omissions to his prejudice. *Angomar* v. *Wilson*, 857.

51. The certificate of a Commissioner for Louisiana of the official capacity of the Clerk of a county court in another State, affords *prima facie* presumption of the legal authority of the Clerk to do what he is shown to have done, to wit, to receive the acknowledgemet of a deed. *Tucker* v. *Burris*, 871.

52. Article 2256 of the Civil Code which declares "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them, or since, applies, as a rule governing real estate, to adjudications made at Sheriff sales. *Linton* v. *Wikoff*, 878.

See WITNESS.
See SLANDER OF TITLE—*Grifon* v. *Blanc*, 5.
See PLEADING—*Elliott* v. *Robb*, 12.
See SALE JUDICIAL—*Waddell* v. *Judson*, 13.
See ACCOUNT—*Keane* v. *Branden*, 20.
See SALE—*Delogny* v. *David*, 30.
*Lesseps* v. *Wicks*, 739.
See PLEADINGS—*Kathman* v. *General Mutual Insurance Company*, 35.
See DAMAGES—*Farwell* v. *Harris*, 50.
*Barton* v. *Cavanaugh*, 382.
See REDHIBITORY ACTION—*Phipps* v. *Berger*, 111.
See DEPOSITION—*Wiggins* v. *Guier*, 177.
See PARTNERSHIP—*Hill* v. *Matta*, 179.
See ATTACHMENT—*Bullitt* v. *Walker*, 276.
See EVIDENCE—*Cornish* v. *Shelton*, 415.
See AUTHENTICATION OF RECORD—*West Feliciana R.R. Co.* v. *Thornton*, 738.
See CRIMINAL LAW—*State* v. *Hash*, 895.

EXECUTION.

1. The principles settled in the case of *Smith* v. *McMicken*, 3 An. 321, reaffirmed. A judgment belonging to a partnership in a steamboat, is not liable to seizure under executions issued on a judgment against the individual members of the partnership. *Beauchamp* v. *Chacheré*, 851.

2. On a judgment of the Supreme Court which condemned a party to pay the fruits at a certain rate per annum, until the restoration of the property, execution could only be issued for the fruits up to the time at which the possession of the property was abandoned to the owner. *Brashear* v. *Dwight*, 860.

EXECUTORS AND ADMINISTRATORS.

1. *A.*, executrix of the estate of *B.*, left the State, after having appointed *C.* as her agent. Certain property of the estate was afterwards sold by order of court, and the price in cash and notes paid over to *C.* as the agent of the executrix. Shortly after *A.* died, and *C.*, the agent, was appointed executor of *B.*'s estate, and in that capacity collected the part of the price unpaid. No account of the price was rendered to the heirs of *B.* by the representatives of *A.*, and her successor in office rendered no account thereof. *Held:* That the failure to deposit the power of attorney of the executrix in the office of the Recorder of Mortgages did not affect the validity of the proceedings under which the property was sold. *Coussy* v. *Vivant*, 44.

2. That the heirs of the executrix, at whose instance the property was sold, could not be made liable for the price: 1st, because the part of the price unpaid at her death was properly paid to her successor in office, and 2d, because the cash payment having been made to *C.*, as agent of *A.*, in her capacity as executrix, he is presumed to have been in possession of the amount at the death of *A.*, and when afterwards appointed the successor in office of *A.*, to have kept possession of the fund in that capacity. *Ibid.*

3. Where a tableau of distribution, filed by the executor, has been advertised and published in the manner required by law, after the expiration of the delay given by such notice, if no opposition be made, the law makes it the duty of the Judge to grant an order authorizing the executor to pay the creditors according to his tableau.
*Succession of Minvielle*, 72.

4. If, at the expiration of the legal delay, the tableau is homologated, except so far as opposed, those creditors whose claims are not contested have a right to immediate payment, without waiting for the delay for a suspensive appeal from the judgment of homologation. *Ibid.*

5. The executor is bound for five per cent. interest on the dividends allowed by the tableau to the creditors whose claims are not opposed, from the date of the service of a rule on him to coerce payment. *Ibid.*

6. The functions of an executor are at an end when a judgment has been rendered on his final account and no appeal is taken from it.
*Succession of Anderson*, 95.

7. When the final account of the executors had been opposed by the residuary legatees and the production of their bank book demanded, the judgment rendered on such opposition being unappealed from, is *res judicata*, and may be pleaded as a bar to a subsequent claim against them for 20 per cent. per annum interest, as the penalty under the statute for failing to deposit the money of the estate in bank. *Ibid.*

8. The administrator of a succession, as respects debts due to himself by the deceased, is upon the same footing as the other creditors.
*Bujac* v. *Loste*, 96.

9. Under a clause in a will by which the testator constituted his executor *detainer* of his estate, *held*, that the *seizin* of the executor did not em-

EXECUTORS AND ADMINISTRATORS (*Continued*).

brace the testator's interest in property belonging to a particular partnership, which the will provided should be continued in accordance with the contract of partnership. *Succession of Grover*, 334.

10. The executor is entitled, however, to his commissions on the net proceeds of the crops received by him from the surviving partner. *Ibid.*

11. A testamentary executor domiciled out of the State is not entitled to letters without giving security, as is required from dative testamentary executors. *Succession of Davis*, 399.

12. A suit to remove an executor from office may be maintained by a portion of the heirs named in the will. *Reed* v. *Crocker*, 445.

13. The Act of the Legislature of March 13th, 1837, sec. 3d, reënacted 12th of March, 1855, imposing a penalty on executors, administrators, &c., for withdrawing the funds of the succession from bank without an order of court, is imperative and must be enforced when there are no peculiar circumstances which form an exception. *Ibid.*

14. The statute is equally imperative that the executor must render a full account of his administration at least once in every twelve months, and the neglect of the counsel of absent heirs to compel an account, will not exonerate the executor. *Ibid.*

15. Where the heirs have authorized the curator to settle up the affairs of the estate out of court, they have no reason to invoke the penal statute of 1837 against the curator. *Plunkett* v. *Perkins*, 558.

16. The allegation by the curator that there was another heir in existence besides those whose authority he had, will not render his former acts unlawful, and subject him to the penalty of the statute. *Ibid.*

17. The beneficiary heir, of age and present in the State, has a preference for the administration over the tutor of a co-heir who is a minor. *Succession of Sloane*, 610.

18. The term, beneficiary heir, applies to one who may accept, as well to one who has accepted with the benefit of inventory. *Ibid.*

19. A woman may be appointed to administer a succession in which she is interested as heir. *Ibid.*

20. The executor, without seizin being given to him by the will, has full power of administration, and unless the heirs furnish him with money to pay the debts and legacies, they cannot prevent him from taking possession of the property and causing sufficient to be sold to settle up the estate. *Succession of Boyd*, 611.

21. The destitution of an executor cannot be demanded by way of opposition, but should be done, if there is cause, by direct action. *Ibid.*

22. The cases of *Taylor* v. *Jeffrey's Estate*, 10 La. 435, and *Michat* v. *Flotte's Administrator*, 12 La. 129, deciding that the functions of an administrator of an estate did not, like those of an executor, cease at the end of a year, but continued until the administration was finished, correctly declared the law. *Ferguson* v. *Glaze*, 667.

EXECUTORS AND ADMINISTRATORS (*Continued*).

23. An Administrator dies without having rendered his account. An Administrator is appointed for his estate. The only regular account the latter can render is of the succession of which he is the administrator. By pursuing the forms of law, his account of this administration may bind such persons as are bound to take notice thereof; but he can bind no one by a pretended account of the administration, by his intestate and himself, of a succession of which he himself never was the legal representative. *Succession of Rachal*, 717.

24. The penalty of ten per cent. interest upon the funds in hand, for a failure by an administrator to render an annual account, can only be enforced when accompanied by a proceeding to remove the administrator.

*Dejol* v. *Johnson*, 853.

See MINORS—*Succession of Lyne*, 155.
See JUDICIAL SALE—*Lafiton* v. *Doiron*, 164.
See SUCCESSION—*Succession of McLean*, 222.
*Succession of Harrell*, 337.
*Succession of Foulkes*, 537.
See CASES AFFIRMED, &c.—*Ferguson* v. *Glaze*, 667.

EXECUTORY PROCESS.

1. To sustain an order of seizure and sale at the suit of the administrator of a succession, authentic evidence of the plaintiff's appointment as administrator is necessary. *Landry* v. *Landry*, 167.

2. It is too late to supply that evidence after the appeal from the order is granted. *Ibid.*

3. Executory process may be taken out against mortgaged property of an estate yet in course of adminstration.

*McCalop* v. *Fluker's Heirs*, 551.

4. Where notice of an order of seizure and sale was given to the defendant as tutrix, she having full authority as such to represent the estate in the proceeding, her qualifying as administratrix did not render it necessary that she should be notified in this latter capacity also.

*Ibid.*

5. Where plaintiff prays that defendant "be notified of his demand by service of citation and a copy of the petition," and defendant is cited in the usual way it will be regarded as an ordinary action.

*Jenkins* v. *Grigsby*, 642.

6. If plaintiff who has a right to an executory proceeding selects the ordinary process, the defendant has a right to answer, and after issue joined, the plaintiff is precluded from discontinuing the ordinary, and resorting to the excutory process. *Ibid.*

EXPERTS, ETC., THEIR REPORT.

1. When the homologation of the report of experts is opposed, the trial of the opposition involves the hearing of evidence on such questions of fact as are distinctly put at issue by the opposition.

*Thompson* v. *Parrent*, 183.

EXPERTS, ETC., THEIR REPORT, (*Continued*).

2. There was error in the Judge's refusal to hear evidence, on the ground that it rested merely in his discretion, and that he was satisfied of the correctness of the report from its face. *Ibid.*

3. After the report of experts is homologatod, the matters decided by it are not open to investigation in the same court. *Ibid.*

EXPROPRIATION OF PROPERTY.

1. Usurpations and wrongs to private rights of property, cannot be justified by considerations of benefit to commerce, and the right of expropriation of private property can only be exercised according to the forms of law. *Bruning* v. *New Orleans Canal Co.*, 541.

2. The confirmation of the tableau of assessment against property owners for their share of the benefit conferred by opening and improving streets, will not authorize the ordinary writ of *fi. fa.* to be issued against the party assessed.

*Municipality No. One*, v. *Laurent Millaudon*, 769.

3. The statute regulating that subject specially prescribes the mode of procedure, and being in derogation of the ordinary rules of practice should, therefore, be strictly pursued. *Ibid.*

See JURY—*Remy* v. *Second Municipality*, 500.

FACTORS.

ADVANCES—See *Kean* v. *Branden*, 30.

SUPPLIES—See *Shaw* v *Knox*, 41.

See ATTACHMENT—*Bullitt* v. *Walker*, 276.

FI. FA.

See EXECUTION.

FRAUD.

See ACTIONS—*Boatner* v *Yarborough*, 249.

GARNISHEE AND GARNISHMENT PROCESS.

1. When the answer of the garnishee admits in effect, the possession of funds belonging to the defendant, and he refuses to state their amount, a point upon which he was specially interrogated, he is presumed to have had a sufficient amount to satisfy the demand of the plaintiff.

*Gaty* v. *Franklin Ins. Co.*, 272.

2. Debtors cannot be permitted to tie up their funds indefinitely by putting them in the hands of an agent. *Ibid.*

3. Until notice to third persons interested in the dedication of the fund, creditors may attach. *Ibid.*

4. Judgment was rendered upon a rule against a garnishee, who was ordered to deliver the assets in his possession to the Sheriff, within a delay fixed, to satisfy plaintiff's judgment against defendant, otherwise to be held liable therefor. *Held:* That after his appearance and joinder of issue on the rule, the garnishee was bound, without further notice, to comply with the order, or assign sufficient reasons for his non-compliance.

*Slatter* v *Tiernan*, 375.

GARNISHEE AND GARNISHMENT PROCESS (*Continued*).

5. The property and effects of the defendant are considered as levied upon by the Sheriff from the date of the service of the interrogatories upon the garnishee. *Ibid.*

6. In tendering a compliance with the order, the garnishee would have the right to require a copy of the order, otherwise when he refuses to comply with the order. *Ibid.*

7. The garnishees, in answer to interrogatories, denied indebtedness to the defendant, but acknowledged the possession of a note past due and protested, which the garnishees had received from the defendant (payee of the note) who was their debtor; the said note exceeding the amount which was due them by defendant and received with an agreement that when paid, its proceeds should be applied, 1st, to the payment of defendant's indebtedness to garnishees; 2d, to that of various other creditors of defendant. Judgment was rendered condemning the garnishees to pay the judgment of plaintiff against defendant, or, in default thereof, to deposit in court the promissory note above-mentioned. *Held:* The judgment appealed from is manifestly erroneous. No money judgment could be rendered against the garnishees, because the answer denied indebtedness and the traverse neither alleged nor was it proved that any money of defendant came into the hands of the garnishees. As to the alternative judgment for the delivery of the note, we hold it to be irregular, because it annuls the pledge of the note for the security of defendant's debt to the garnishees, a contract which could only be annulled by a direct action. *Pooley* v. *Snow*, 814.

See ATTACHMENT.

HOMESTEAD.

See SUCCESSION—*Succession of Foulkes*, 587.

HOMESTEAD ACT.

1. The Act of the 17th of March, 1852, providing a homestead for the widows and children of deceased persons, is without effect as to creditors whose rights had accrued before the passage of the Act. *Milne* v. *Schmidt*, 553.

2. Under the second section of the Act of March 17th, 1852, "to provide a homestead for the widows and children of deceased persons," it was *held:* That the surviving widow was bound to give security as usufructuary, the usufruct being of money belonging to her deceased husband's children by a former marriage. *Succession of Tassin*, 885.

HUSBAND AND WIFE.

1. The receipt by a husband residing abroad, of money belonging to his wife, does not entitle the wife to a legal mortgage on property acquired by the husband in this State after their subsequent removal to it. *Stewart* v. *His Creditors*, 89.

2. Where the wife had obtained a judgment of separatien of property from her husband, and subsequently purchased property in her own name, and the proceedings were charged by the creditors of the husband to have been fraudulent and collusive between the wife and the hus-

HUSBAND AND WIFE (*Continued*).

band—*Held:* That to support the wife's separate title, the judgment of separation is not sufficient. The creditors have a right to demand the evidence on which it was rendered. *Campbell* v. *Bell*, 193.

3. It must also be shown that the property was purchased with the wife's separate funds. *Ibid.*

4. When a husband and wife had voluntarily lived separate and apart, and the wife during that time had purchased real estate, the title to which, being on record in the name of the wife, as a donation made to her individually, was subsequently acquired by an innocent third person in good faith, under a chain of title from the wife, it was *held* that the husband could not, after the wife's death, recover the property, as having belonged to the community, and having been sold by the wife without authority. *Wooters* v. *Feeny*, 449.

5. The husband, by parol evidence, could not thus despoil the purchaser of immovable property, acquired under a chain of recorded titles apparently perfect, without notice, actual or constructive, of the husband's latent claim, which has no basis in equity. *Ibid.*

6. At the decease of husband or wife, all the property possessed by them is presumed to be community property until the contrary is shown. *Succession of Pratt*, 457.

7. If the surviving wife expresses her willingness to pay all the debts, and no creditors desire it, an administration on the husband's estate, so far as it concerns the community, is unnecessary. *Ibid.*

8. When it is not alleged or shown that any part of the estate was the separate property of the husband, the surviving wife has the right to be put in possession of all the property left by him, on complying with the obligations of the usufructuary, as explained in the Civil Code. Her usufruct of the share of her deceased husband commences from the moment of his death. *Ibid.*

9. The heirs of the husband should be protected against the debts of the estate by requiring the wife to advance the money to pay them, or procure the release of the heirs from all liability for them. *Ibid.*

10. When the wife's paraphernal property was sold and negotiable notes taken for the price, payable to the husband, on which the husband sued the makers, and obtained judgment against them in his own name for the amount of the notes, it was *held:* That the legal ownership of the judgment was in the husband—that the original notes were merged in and novated by the judgment, and that the judgment might be compensated by any debts equally liquidated due by the husband to the judgment debtor. *Succession of Gilmore*, 562.

11. A married man may sue his wife in her executorial capacity, for a debt due him by the testator. The institution of the suit by the husband will be considered as an authority to her to be sued. *Alexander* v. *Alexander*, 588.

HUSBAND AND WIFE (*Continued*).

12. Where husband and wife make a note during the coverture, judgment cannot be obtained against the wife, where there is no proof that she was not separate in property, and no evidence to show that the consideration inured to her benefit. *White* v. *Baillio*, 663.

13. The wife, whether separated in property by contract or judgment, or not separated, cannot bind herself for her husband, nor conjointly with him for debts contracted by him before or during the marriage. C. C. 2412. *Heald* v. *Owings*, 725.

See COMMUNITY—*Audrich* v. *Lamothe*, 76.
*Hotard* v. *Hotard*, 175.
*Succession of McLean*, 222.
*Wilson* v. *Hendry*, 244.
See SEQUESTRATION—*Goodin* v. *Allen*, 448.
See PRACTICE—*Barton* v. *Kavanaugh*, 832.
See MORTGAGE—*Succession of Valansart*, 848.
*Theriet* v. *Voorhies*, 852.
See DIVORCE—*Trowbridge* v. *Carlin*, 882.

INJUNCTION.

1. An injunction will not be maintained in arrest of an execution on grounds that might have been pleaded in defence before judgment. *McRae* v. *Purvis*, 85.

2. Where no ground is laid for an action of nutility, an injunction is allowable only for a payment alleged to have been made after judgment rendered. *Todd* v. *Paton*, 88.

3. Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, under the Acts of 1831 and 1833, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest. Whatever else is allowed can only be in the shape of damages, and the interest is to be allowed only upon the principal of the debt enjoined. *Ibid.*

4. Where the plaintiff in an injunction seeks to restrain the execution of a judgment, on the ground that the property seized does not belong to the judgment debtor, but to the plaintiff in injunction, no other issue can be made but that of ownership. An affidavit that the Sheriff had "seized" the individual property of the defendant, without any description of the property seized, or statement of its value, is too vague to authorize an injunction, and the petition which is not sworn to cannot supply the defect. *McRae* v. *Brown*, 181.

5. The fee of counsel for the defendant should be assessed as damages on dissolving the injunction, although it was not shown to have been actually paid. The liability to pay it is sufficient. *Ibid.*

6. Where an injunction has been sued out on grave charges of fraud and simulation, and the plaintiff offers no evidence whatever to sustain them, the maximum of damages allowed by law should be awarded to the defendant on the dissolution of the injunction. *Oulliber* v. *Joublanc*, 237.

7. The plaintiffs being joint owners with the city of the land on which the Magazine Street Market is erected, and having recovered a judgment

INJUNCTION (*Continued*).

against the city fixing their right to a certain proportion of the revenues of the market, the city obtained an order for a sale of the property to effect a partition, and the Council passed a resolution to discontinue the market as a public market. *Held:* That the plaintiffs are entitled to enjoin the execution of the ordinance as an invasion of their right of property and a violation of the tenure and contrary to the title by which the city holds an interest in the property, as established by the judgments between the parties. *Heirs of Guillotte* v. *New Orleans*, 479.

8. Where the sale of specific property alleged to have been seized under execution is informal, and there had in fact been no seizure of the property, it was error in the court below in dissolving the injunction to allow special damages. *Taylor* v. *Simpson*, 587.

9. Successive injunctions upon different grounds which might have been put at issue in one proceeding, will not be allowed.

*Pluker* v. *Davis*, 613.

See JUDGMENT—*Crow* v. *Watkins*, 845.

INSANITY.

1. Where the defence set up to a recovery upon a contract is the insanity of the obligor, it must be shown that the mental derangement was notorious when the contract was entered into, where there had been no interdiction of the party sought to be charged. C. C., 1781.

*Succession of Smith*, 24.

2. Insanity, which of itself, is sufficient to strike an act with nullity, cannot be set up, unless the interdiction of the insane person had been pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or when the want of reason results from the act itself which is contested. *Chevalier* v. *Whatley*, 651.

3. But when the contract is sought to be set aside, the state of mind of the party at the time, may be proven, although the proof tends to show imbecility and there has been no interdiction. *Ibid.*

4. Contracts made with weak-minded persons will be closely scrutinized, and presumption of fraud will arise from circumstances, indicative of over influence or any advantage improperly taken, which would not arise in a strong-minded person. *Ibid.*

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. A syndic who has a surplus in his hands, after paying all the debts placed upon his tableau of distribution, is not bound to pay over such balance to the ceding debtor, if subsequent to the filing of the tableau new debts were discovered to exist. The syndic is bound to administer any surplus in his hands for the benefit of such newly discovered creditors, and until all the creditors are paid the assets in the hands of the syndic must be applied to the payment of the debts of the insolvent.

*Gottschalk* v. *His Creditors*, 70.

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued*).

2. Where an insolvent had neglected to make one of his creditors a party to the insolvent proceedings and being himself syndic, had, in violation of the Act of 1837, suffered nine years to elapse without filing a tableau of distribution, it was *held*, he was not in a condition to compel such creditor to become a party to his stale proceedings in surrender, but that the creditor might wholly disregard them.

*Metcalfe* v. *Clark*, 424.

3. The presumption established by the Act of 1817, reënacted in 1855, (Revised Statutes, p. 257, § 28), applies to cases alone in which proceedings are instituted against the insolvent to deprive him of the benefit of the insolvent laws, on the ground of his having given an unjust preference to one or more of his creditors over others. *Martin* v. *Drumm*, 494.

4. The Code of 1825, on the subject of respite, has not introduced a new rule of counting the votes at the meeting of the creditors. The majority in number and amount is to be ascertained by reference to those admitted by the debtor upon the tableau. *Rouanet* v. *Castel*, 520.

5. The Legislature having apparently acquiesced in this previous construction of the law, which is one favoring the obligation of contracts, the court has less difficulty in adopting it. *Ibid.*

6. The charges for professional services in the settlement of insolvent estates, ought to be in proportion to the results of the liquidation.

*McIntosh* v. *Merchants' Insurance Co.*, 533.

7. The 6th section of the Act of the 29th of March, 1826, (session Acts, p. 140) which provides for a sequestration of the property and a meeting of the creditors of any merchant or trader who shall abscond or conceal himself in order to avoid the payment of his debts, is still in force.

*Levois* v. *Gerke*, 828.

8. This law provides for a mode of proceeding different from the one had in view in cases of voluntary and forced surrender, and is not affected by the Acts of 1855 upon those subjects. *Ibid.*

See INTEREST—*Finley* v *Mallard*, 883.

INSURANCE.

1. Freight paid in advance is a lawful object of insurance, and the underwriter cannot avoid liability on the ground that freight thus paid in advance might be recovered back in consequence of the loss of the cargo.

*Kathman* v. *Gen. Mutual Ins. Co.*, 35.

2. Where, by the terms of the policy of insurance, the party desiring to be insured, upon any particular shipment of merchandize, was bound to present to the Insurance Company an invoice of the goods, and pay or secure the premium to the company—*Held:* That on a policy of insurance in this form, there must neccessarily exist as many contracts of insurance as the endorsements upon the policy of seperate shipments of goods; that such contracts only became complete when the invoices of the goods were presented and endorsed upon the policy.

*Douville* v. *Sun Mutual In. Co.*, 259.

INSURANCE (*Continued*).

3. The assured under such a policy could not recover from the underwriters for the loss of goods the shipment of which did not appear by any bill of lading, and of which no invoice had been furnished to the company previous to the loss. *Ibid.*

4. The doctrine of abandonment for a constructive total loss, does not appear to apply to a contract of affreightment.
*Henderson* v. *Maid of Orleans*, 352.

5. If, upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person.
*Duncan* v. *Sun Mutual In. Co.*, 486.

See PRINCIPAL AND AGENT—*Keane* v. *Brandon*, 20.
*Miller* v. *Tate*, 160.
See PLEADING—*Kathman* v. *General Mutual Insurance Company*, 35.

INTEREST.

1. Where the factor has made advances to the planter from his own resources, all charges for negotiations, discounts and commissions, if charged in addition to eight per cent. per annum, are illegal.
*Keane* v. *Brandon*, 20.

2. Interest may be charged on the balance of an account rendered and acquiesced in, although the account was made up in part of interest, provided the interest so charged was not usurious. *Ibid.*

3. Interest cannot be claimed distinctly from the principal; the law makes no distinction between interest claimed as damages and interest as in other cases; the interest should have been claimed on the trial of the opposition. *Succession of Anderson*, 95.

4. Interest cannot be claimed on a judgment which does not bear interest on its face, and which was rendered when no general law was in force by which interest was superadded to it. *Barnes* v. *Crandell*, 112.

5. The claim of the appellant, for interest upon her judgment against the estate as heir of her father, was rejected on the ground that the judgment carried no interest on its face. *Succession of Regan*, 116.

6. Where usurious interest was stipulated before the passage of the Act of 20th March, 1856, "relative to the rate of interest," but paid since the promulgation of that Act—*Held:* That the whole of the interest paid could be recovered back under the second section of the Act of February 19th, 1844. *Merville* v. *LeBlanc*, 221.

7. The contract relative to interest was void at the time it was entered into, and it remained unaffected by the subsequent law in existence when the payment was made. *Ibid.*

INTEREST (*Continued*).

8. The Act of 1839 repealed Article 554 C. P., and implies the allowance of interest on unliquidated demands. *Roper* v. *Magee*, 409.

9. The Act of the Legislature of 9th March, 1852, giving legal interest from the maturity of debts, does not affect debts contracted anterior to the passage of the Act. *Cooper* v. *Harrison*, 631.

10. The highest rate of conventional interest for the loan of money, and two-and-a-half per cent. in addition thereto for advancing, is usurious. *Haven* v. *Hudson*, 660.

11. The State has a right to recover legal interest on a forfeited bail bond from the principal and surety therein from the date of the judgment. *State* v. *Sullivan*, 720.

12. The Act of the Legislature declaring that debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated, is not applicable to debts which were contracted and became due before the passage of that law. *Saunders* v. *Carroll*, 793.

13. A promissory note payable generally must bear the rate of interest of the place where it is made. *Hawley* v. *Sloo*, 815.

14. If the place of performance is different from that of the contract the interest will be according to the latter. *Ibid.*

15. The interest on a claim is not suspended by the debtor placing it upon his schedule, where the creditor takes no part in the proceeding although the debtor may obtain a respite. *Finley* v. *Mallard*, 833.

See USURY.

INTERROGATORIES ON FACTS, &c.

1. It is only when there has been an actual delivery of immovables or slaves sold that the law receives as evidence of the sale the confession of the party when interrogated on oath. C. C. 2255. Parol evidence cannot be received to contradict the answers. *Knox* v. *Thompson*, 114.

2. Where a party who has been put upon oath gives all the facts of the case which are necessary to the determination of the question propounded to him, he has complied with the law, and he is not bound nor permitted to answer questions of law based upon those facts. *Ibid.*

INTERVENOR.

See PRACTICE—*Yale* v. *Hoopes*, 460.

JUDGMENT.

1. A judgment rendered against a married woman in a suit regularly prosecuted by attachment, is not open and cannot be questioned as to the original indebtedness, without any action of rescission having been brought or any appeal taken from the judgment within two years. *Waddell and Husband* v. *Judson*, 13.

2. When a judgment has once been signed by the Judge, it should be interpreted by the court which rendered it, as well as by all others, as the foreign writers say, objectively; that is, it should be construed with reference to the pleadings and the subject matter of the controversy

JUDGMENT (*Continued*).

according to the natural and legal import of the terms used, without any reference to any subsequent explanation of the court of what was its intention or in its mind at the time the decree was rendered. *Succession of Regan*, 156.

3. It is a sufficient compliance with Art. 72 of the Constitution, for the Judge to state in his decree that, "after hearing evidence and argument of counsel for the reasons assigned in open court, it is adjudged and decreed, &c." *Jacobs* v. *Levy*, 410.

4. Where judgment was rendered without a hearing or consent of parties, *held*, that although rendered in favor of the plaintiff, he had a right to have it set aside if it was not such a judgment as he wanted. *May* v. *Ball*, 416.

5. When the proper parties are before the court for the rendition of a decree, the parties to it can only take advantage of any irregularities in it by an appeal or action of nullity prosecuted in due time. *Greenwood* v. *New Orleans*, 426.

6. A judgment signed before a motion for a new trial is overruled, cannot be considered as having its effect until the motion is disposed of. *Succession of Gilmore*, 562.

7. Where a judgment is rendered upon a note, the latter is merged in the former, and can be severed only by a reversal or rescission of the judgment. *West Feliciana Rail Road* v. *Thornton*, 736.

8. A final judgment of a competent court of a sister State after citation, is conclusive of the matters therein determined between the same parties here, in the absence of evidence positively impeaching it. *Ibid.*

9. Suit was brought in Mississippi against defendant by attachment. No service of process was made upon him, and the only evidence of his appearance was an entry on the minutes, that "defendant waives proof of publication, and saying nothing in bar or preclusion of the plaintiff's action, but herein wholly make default whereby the same remains altogether undefended." *Held:* The judgment against the defendant by the laws of Mississippi was not personal, and no action can be maintained upon it, as such, in our courts. *Feltus* v. *Starke*, 798.

10. A judgment cannot be enjoined by a plea in compensation founded on notes of the plaintiff held by defendant before the judgment enjoined was rendered. *Crow* v. *Watkins' Heirs*, 845.

11. In the absence of proof it will be presumed that the notes were acquired before their maturity. *Ibid.*

See EXECUTION.
See SALE JUDICIAL—*Laforest* v. *Barrow*, 148.
See PRACTICE—*Flynn* v. *Rhodes*, 239.
See APPEAL—*Beer & Co.* v. *Their Creditors*, 774.

JURISDICTION.

1. When the value of the object in controvery is sufficient, according to the allegations of the petition, to give the court jurisdiction, the fact that the price paid for it by the plaintiff is below the amount required to give the court jurisdiction is not sufficient of itself to destroy the allega-

JURISDICTION (*Continued*).

tion as to the true value. The allegation in the petition as to the value of the object in controversy determines the question of jurisdiction when the claim is not evidently fictitious. *Oakey* v. *Aiken*, 11.

2. The District Judge of the Parish in which the slaves are situated, has jurisdiction to try an action for their partition.

*Anderson* v. *Stille*, 669.

JURY AND JURORS.

1. The affidavit of the jurors who tried the case, as to what they understood at the time of rendering their verdict would be its effect, is inadmissible. The effect of the verdict is a matter of legal construction, and the jurors have no capacity to serve as its interpreters. *Jeter* v. *Heard*, 3.

2. The Judge has the right to assume, in his instructions to the jury, a hypothetical state of facts, and say to the jury if they believe such a state of facts to be proved, that it amounts to a commission of the crime or offence charged.. *State* v. *Lenares*, 226.

3. But the jury are the sole judges of the facts, and, under the instruction of the court, they have the right to say whether the offence charged is a violation of the statute or not. *Ibid.*

4. The jury to be empannelled under Art. 2608 of the Civil Code, to estimate the value of property to be expropriated, should have a personal knowledge of the value of real estate in the vicinage; they act as experts, and though it is proper, especially if they request it, that they should be aided by the opinions of witnesses, a personal examination of the premises by the jury in a body, after it is empannelled, should be a feature of every proceeding under that Article of the Code.

*Remy* v. *Second Municipality*, 500.

5. In *all* criminal cases the separation of the jury, though by leave of the court and with the consent of the accused and his counsel, will vitiate the verdict if such separation take place after the evidence had been closed and the charge given. *State* v *Populus*, 710.

6. In a suit for damages where one of the defendants is charged with aiding and abetting the other in the commission of a wrong or injury, he has a right to demand a severance, and trial by jury.

*Fonda* v. *Broom*, 768.

See CRIMINAL LAW—*State* v. *Bogain*, 264.
*State* v. *Smelser*, 886.

LAWS.

1. It is a sound rule of construction never to consider laws as applicable to cases which arose previous to their passage, unless the Legislature have in express terms declared such to be their intention.

*Saunders* v. *Carroll*, 793.

LEASE.

1. Where the right to the unexpired term of a lease, together with the movables on the premises, were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire—*Held:* That the purchaser had no right of action against the lessor for

LEASE (*Continued*).

the repetition of the rent which had been paid to him on the distribution of the proceeds of the sale. *Hayden* v. *Heirs of Shiff*, 524.

2. Plaintiffs purchased certain premises of which defendant had been the lessee of their vendor for a term of years, already expired, they assuming to prosecute to final judgment a suit commenced by him to oust his leesee, who claimed a tacit reconduction of the lease. This suit resulted in a judgment in their favor, under which defendant surrendered the property to them. *Held:* That a written notice given by the plaintiffs to defendant of their purchase, and that they would look to him for the rent, was not an agreement on their part to charge the same rent as was stipulated in the expired lease. *Jamison* v. *Fairès*, 790.

3. The provisions of our laws on letting and hiring do not favor abrogation of leases, where the loss or inconvenience is not caused by the fault of the lessor. Except in extreme cases the remedy of the lessee is for indemnification. *Denman* v. *Lopez*, 823.

LEGACY.

1. *John McDonogh*, by his will, instituted as his universal heirs the city of New Orleans and the city of Baltimore; he gave as an annuity to the *Society for the Relief of Destitute Orphan Boys*, one eight part of the net yearly revenues of the rents of the whole of his estate, until $400,000 was realized; the said one-eighth part of the revenues to be set apart yearly or half yearly by the commissioners and agents of the general estate, (for whose appointment the will provided,) and deposited in some one or more of the banks of New Orleans until the same should amount to $400,000. The will provided that the said amount should be invested in the purchase of real estate, from which a perpetual revenue from the rents of said estate should be drawn for the support of the Institution; that the directors of the said society, assisted by the Mayor and Aldermen of the city of New Orleans should make the investments, and that the Mayor and Aldermen should approve of the purchases of real estate and become parties to the deeds by which the property should be acquired. *Held:* That the pendency of a suit between the cities for a partition of the succession, was no bar to an action for such installments of the annuity as had fallen due; that the mode of investment was a matter of mere form which could not operate to annul or defeat the bequest; that it was not in the power of the testator to compel the city, through its Mayor and Aldermen, to become a party to the purchases in real estate in which it was to have no interest, it being the intention of the testator that the *Society for the Relief of Destitute Orphay Boys* should be the recipient of the bounty: that the liability of the defendants to discharge the legacy was not affected by the control over the estate given in the will to the commissioners and agents whose appointment was directed; that it was contrary to public law and policy that the simple tenures by which alone our laws permit property to be held, should be so complicated; and that such illegal modes, conditions and charges imposed by the will are to be disregarded.
*Orphan Society* v. *New Orleans*, 62.

See WILLS.

LIS PENDENS.

1. A party who has appealed from a judgment homologating the proceedings of a family meeting, cannot, at the same time, carry on an action to annul these proceedings. The action of nullity will be dismissed on the exception *lis pendens*. *Stone* v. *Tucker*, 726.

LITIGIOUS RIGHT.

1. The transfer of a judgment rendered in another State, which is final between the parties, cannot be resisted when sued on by the assignee in this State, as being the sale of a litigious right. *Lackey* v. *Tiffin*, 53.

MALICIOUS PROSECUTION.

1. An action for damages for malicious prosecution should not be maintained without proof of malice or bad faith on the part of the prosecutor. *McCormick* v. *Conway*, 53.

2. Malice may be inferred from an utter absence of probable cause, but in such case, the absence of probable cause, to form the basis of a presumption of malice, should be shown affirmatively and positively. *Ibid.*

MANDAMUS.

See APPEAL—*State* v. *Judge*, &c. 342.
See SUPREME COURT—*State* v. *Judge*, &c. 405.

MANDATE AND MANDATORY.

See PRINCIPAL AND AGENT.

MARRIED WOMEN.

1. A married woman is responsible *civiliter* for her wrongful acts, even when done in the presence of her husband. *Clement* v. *Wafer*, 599.

See PRESCRIPTION—*Orcutt* v. *Berrett*, 178.
See SUPREME COURT—*State* v. *Judge*, &c. 405.

MINORS.

1. In cases of partition where some of the part owners are minors, the Judge has no power of his own will to order a sale of the property to be divided, upon terms of credit. This can only be done at the instance of the tutor and upon the advice of a family meeting. C. C. 1263. *Succession of Morgan*, 153.

2. A minor emancipated under the Act of the Legislature of March, 1855, but not yet over twenty-one years of age, is invested with all the capacities in relation to his property and obligations which he would have had actually at the age of twenty-one years, and may be appointed Administrator of a succession. *Succession of Lyne*, 155.

3. The doctrine in the case of *Maillefer* v. *Saillot*, 4 An. 375, that the marriage of a minor in another State, when contracted in violation of our own laws, does not operate the emancipation of the minor, recognized and reaffirmed. *Babin* v. *LeBlanc*, 367.

4. An allowance cannot be made for the support of the minor heirs of a succession, under the Act of the 29th March, 1826, when such minor heirs are not creditors of the succession of their deceased parent. *Succession of Broderick*, 521.

MINORS (*Continued*).

5. The marriage of a minor, domiciled in Louisiana, contracted in another State, in fraud of our laws, does not emancipate the minor, and her tutor cannot be held responsible for affording shelter and protection to his ward, and even counselling her in her difficulties.
*Clement* v. *Wafer*, 509.

6. A person who, without the consent of the tutor, pursuades a minor to elope with, and marry him, in fraud of our laws, acquires no right to administer her estate, and, perhaps, no right to her person and to her society, except so far as voluntarily yielded to him. *Ibid.*

See TUTORS AND TUTORSHIP.
See MORTGAGE—*Massey* v. *Steeg*, 78.
See EVIDENCE—*Succession of Creizet*, 401.
See PLEADING—*Edwards* v. *Morrow*, 887.

MORTGAGE.

1. When the price of property was paid in cash, with money borrowed by the purchaser, but at the same time the purchaser executed his note for the amount to the order of the vendor, and consented, in the act of sale, to a mortgage upon the property, in favor of the vendor, or any *bona fide* holder of the note, the transaction cannot be considered simulated, and the lender of the money, as holder of the note, will be protected in his right of mortgage. *Cole* v. *Lovenskiold*, 16.

2. The adjudication to the surviving father or mother of property held in common with the minor child under Article 338 of the Civil Code, is not restricted to immovables and slaves. *Massey* v. *Steeg*, 78.

3. Where such adjudication takes place, the special mortgage in favor of the minor, resulting from the adjudication, attaches to such of the property adjudicated as is susceptible of mortgage. The right of mortgage in this case is not restricted to the individual share of the minors, but the whole property remains specially mortgaged for the security of the payment of the price of the adjudication. *Ibid.*

4. Any one whose rights are affected by such mortgage, may require that the exact amount of the testator's indebtedness to the minors be judicially ascertained. *Ibid.*

5. A judicial mortgage affects the debtor's slaves attached to a plantation in a parish where the judgment was not recorded, from the date of the registry in the parish of the debtor's domicil. C. C. 3318, 3328, 3317, 3296, 3217. *Spencer* v. *Amis*, 127.

6. The mortgage and seizure by executory process of the defendants having been made before the debt of plaintiff accrued, the latter is precluded, by Art. 1988 of the Civil Code, from having them annulled, as made in fraud of her rights. *New Orleans* v. *North*, 205.

7. A right of preëmption and improvements on the public domain, are not susceptible of mortgage under the Code. *Penn* v. *Ott*, 233—See 235.

8. An order of seizure and sale on a mortgage of such objects, is a nullity. *Ibid.*

MORTGAGE (*Continued*)

9. The tacit mortgage of the minor on the property of his tutor can only be enforced for the balance which will appear to be due him, upon an account of tutorship rendered or ascertained by a judgment obtained against his tutor in default of rendition of account.

*McHugh* v. *Stewart*, 361.

10. The tutor himself cannot assert this tacit mortgage upon property which was affected by it in his hands, and which he has alienated or incumbered in favor of third persons: *non constat*, that at the termination of the tutorship he will owe the minor anything, and even if this should be the case, the latter would have to proceed first against such property as his tutor might then be possessed of, the law reserving to the third possessors of property sold by the tutor the right of discussion.

*Ibid.*

11. A steamboat is not an object susceptible of hypothecation under the laws of this State. *Succession of Broderick*, 521.

12. The Act of Congress regulating the mode of registering mortgages on vessels was not intended to legalize contracts between citizens of the same State, made within the limits of that State, and intended to be executed there, which are contrary to the law of the State. *Ibid.*

13. When a wife had obtained a judgment for separation of property against the husband, and under her execution had purchased a tract of land, but omitted to record the Sheriff's deed to the same, until after a creditor of the husband had obtained and recorded a judgment against him. *Held:* that the sale to the wife, as to the judgment creditor of the husband was null and void, because not recorded according to law, and that the wife had the option to pay the creditor or suffer the property to be sold and assert her mortgage (and the valid mortgages to which she was legally subrogated,) upon the proceeds of the sale.

*Scott* v. *Jackson*, 640.

14. A mortgage executed by defendant on property claimed by plaintiff, pending the suit of the latter for its recovery, is without effect against him.

*Masson* v. *Saloy*, 776.

15. Where the wife renounces, in favor of a mortgage creditor of her husband, her prior tacit mortgage on his property, for the restitution of her paraphernal effects, such renunciation, which is a mere waiver of the rank to which her mortgage was entitled, does not subrogate the creditor to the wife's paraphernal claims against her husband; and this creditor, not being the transferee of these claims, cannot exercise the wife's right of mortgage. In asserting his claims upon the mortgaged property he can look only to his own mortgage, taking effect from the date of its inscription. Such a renunciation by the wife does not contravene Art. 2412 of the C. C. and is expressly authorized by the Act of 1835. A declaration, in the act of renunciation, that it shall deprive the wife irrevocably of all recourse on her husband's property, will not invalidate the contract, but may be treated as mere subterfuge, and is not binding on her. Nor does the husband's having stipulated

MORTGAGE (*Continued*).

with his creditor to procure his wife's renunciation affect in the least its validity, without proof of threats of violence on his part, or of fraud. *Porche* v. *LeBlanc*, 778.

16. The vendor of an immovable or slave must cause the act of sale to be duly recorded, in order to preserve his privilege; if not so recorded within six days from its date, if passed in the place where the registry of mortgages is kept, adding one day for every two leagues from the place where it was passed to that where the Register's office is kept, it has no effect as a privilege—*i. e.*, it confers no preference over creditors who have acquired a mortgage in the meantime, which they have recorded before it; but it will still avail as a mortgage, and be good against third persons from the time of its being recorded. *Ibid.*

17. On the removal to this State of French subjects, who were married and resided long after their marriage in France, a tacit mortgage in favor of the wife for preëxisting claims against her husband, originating during their residence in France, does not attach to the immovables acquired by her husband after his arrival here. *Succession of Valansart*, 848.

18. When the husband mortgaged the separate property of his wife to secure a debt due by himself, and the wife appeared in the act and made a formal renunciation of all her rights, it was held that the act was not binding on the wife. *Theriet* v. *Voorhies*, 852.

19. The word "immovables," as employed in Article 3256 of the Civil Code, which specifies the objects which *alone* are susceptible of mortgage, was intended to embrace only such things as are immovable by their *nature*, as lands, buildings, &c. *Voorhies* v. *DeBlanc*, 864.

20. "An action for the recovery of an immovable estate or an entire succession," although, by legal intendment considered an incorporeal immovable, is not susceptible of mortgage. *Ibid.*

21. An entire succession, disregarding the elements which enter into its composition, is not an object susceptible of mortgage. *Ibid.*

22. A judicial mortgage will not attach to an immovable action as distinguished from the property which is the object of the action, nor to the entire interest of the debtor in the movables, slaves and immovables which composed the active mass of a succession falling to him as heir. *Ibid.*

See HUSBAND AND WIFE—*Stewart* v. *His Creditors*, 89.
See PRESCRIPTION—*Succession of Flower*, 216.
See SALE, JUDICIAL—*Finley* v. *Babin*, 236.
See SALE—*Johnston* v. *Bloodworth*, 799.

NEW ORLEANS.

1. Such portions of the Act No. 71 of 1852, entitled "An Act to consolidate the city of New Orleans and provide for the government and administration of its affairs," as are not contrary to the Act No. 164 of 1856, entitled "An Act to amend an Act entitled 'An Act to consolidate the city of New Orleans and to provide for the government of the city of New Orleans and the administration of the affairs thereof,'" are not repealed by the latter Act. *Guillotte* v. *City of New Orleans*, 432.

NEW ORLEANS (*Continued*).

2. The former city authorities having had the power "to regulate every thing which relates to bakers," the present city authorities have not been deprived of it by the Act of 1856. *Ibid.*

3. There is nothing unconstitutional in those parts of the city ordinance which regulate the weight and inspection of bread. *Ibid.*

4. The authority given by the ordinance to seize bread unstamped or deficient in weight, and to conduct the offender before the Recorder to be by him dealt with, is not a violation of Article 6 of the amendments to the Constitution of the United States. *Ibid.*

5. Violations of the city ordinance may be prosecuted before the Recorders of New Orleens, where it is so directed by law or the ordinance. *Ibid.*

6. The forfeiture, for the use of the city workhouse, of bread illegally baked, is not a violation of Article 105 of the Constitution. *Ibid.*

7. The contract spoken of by Article 105 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law. *Ibid*

8. The Auditor of Public Accounts has no authority, under the Act of the Legislature of 13th March, 1855, (sec. 9,) to appoint counsel to appear for the State in civil suits in the District Courts in New Orleans, or to appear for the State in the Supreme Court in New Orleans. *Succession of Fletcher*, 498.

9. In the city of New Orleans the State is represented by the Attorney General, its highest law officer, who is required by law to keep his office there. *Ibid.*

10. It was the intention of the Legislature, in the above recited Act, to provide for the collection of money due the State in parishes or in courts where the State should be unprovided with an official representative. *Ibid.*

11. Previous to the compromise of September, 1820, between the city and various claimants of the batture of the faubourg St. Mary, the levee followed the outer edge of Tchoupitoulas street, which was the original high road along the river bank, and lots for private occupation could not have been lawfully laid out upon the soil of Tchoupitoulas street. *Remy* v. *Second Municipality*, 500.

12. The Act of the Legislature of the 21st of March, 1850, authorizing the city of New Orleans to lay out and establish lots upon the batture in front of the faubourg St. Mary, raised an interdict which the Legislature had imposed by the Act of March 8th, 1836, upon the private occupation of the batture outside of New Levee street. *Ibid.*

13. Until the Act of the Legislature of 3d of April, 1853, the corporation had the excluive right to determine where and to what extent the riparian proprietors might take psssession of the batture. *Ibid.*

14. The division of the batture outside of New Levee street as far as Front street, into streets and squares, was not an expropriation of the pro-

NEW ORLEANS (*Continued*).

perty so far as the streets were concerned, of which the riparian proprietors had never been in possession. *Ibid.*

15. As it respects municipal corporations it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandataries of the government is not a contract, and, as a consequence, that the Legislature may modify such Acts of incorporation at its pleasure.

*Layton* v. *New Orleans*, 515.

16. The Legislature had the power to abolish entirely the corporation of the former city of Lafayette, until it became incorporated in the city of New Orleans, and was finally protected as a part of the same by the Constitution of 1852. *Ibid.*

17. The Acts of the Legislature which, in consolidating the three municipalities and the city of Lafayette under one government, directed that the debts of each, which were to be assessed by the city at large, should alternately be liquidated and paid by taxation of the inhabitants of the respective districts, in proportion to the burden which they imposed upon the new government by their respective debts, were not contracts. There was nothing to prevent the Legislature from changing its policy and providing, as was done by the Act of 12th March, 1856, that the taxes should be equal and uniform within the entire limits of the city. The statute complained of is a literal compliance with the commands of the Constitution, and does not violate any contract or interfere with any vested right. *Ibid.*

18. The city of New Orleans having voluntarily accepted a partnership with individuals in the profits to be derived from a market-house, cannot claim to be on a different footing as regards its social rights, at least in what regards the financial administration of the partnership property, from another partner. The peculiar quality of this corporation, clothed by the Constitution with many of the most important functions of government, does not take from the other party to the partnership the right to be consulted in matters which concerned the social interest.

*New Orleans* v. *Heirs of Guillotte*, 818.

See DAMAGES—*Wilde* v. *New Orleans*, 15.
*How* v. *New Orleans*, 481.

NEW TRIAL.

1. Where a part of the testimony taken in the lower court has been lost, the case will be remanded for a new trial. *Barrow* v. *Landry*, 83.

2. Where plaintiff applied for a new trial, on the ground that the introduction of his letters and account sales, to prove facts specially pleaded, of which facts those letters and accounts were the best and most direct evidence, had taken him by surprise. *Held:* that the new trial was properly refused. *Donnell* v. *Parrott*, 690.

NOTICE.

See REGISTRY—*Sheppard* v. *Leeds*, 1.

NOVATION.

1. Novation will not be presumed. "It can only be established by an express declaration to that effect by the creditor or by acts which are tantamount to such a declaration." C. C. 2188.

*Smith* v. *Brown*, 299.

2. When the tutor gave his individual notes for the amount of an account rendered by an attorney-at-law for professional services in suits in which the interest of the minor were involved, *held:* that it was not a novation of the debt. *Ibid.*

OFFICE AND OFFICER.

1. The city cannot be held liable under a contract made by the Municipal officers in violation of law. *Fox* v. *New Orleans*, 154.

2. A notary public cannot be allowed to increase his legal fees for those acts which he does in his official capacity, by testimony as to the value of extra services. *Hawford* v. *Adler*, 241.

For powers of Auditor to appoint counsel in New Orleans in certain cases,
See NEW ORLEANS—*Succession of Fletcher*, 498.
See PUBLIC LANDS—*Lawrence* v. *Grout*, 835.

OFFSET.

1. Compensation rests upon good faith. *Vincent* v. *Gandolpho*, 526.

2. An assignee, for the purpose of distributing a fund which is the common pledge of one's creditors, cannot offset his own debt (the character and terms of which he does not disclose) against a portion of the common fund thus entrusted to him. *Ibid.*

3. The fund is liable to attachment in his hands at the suit of the creditors of the assignor. *Ibid.*

See COMPENSATION.

OPPOSITION.

See PRACTICE—*Romagosa* v. *Nodal*, 341.
*Yale* v. *Hoopes*, 460.

OVERSEER.

See DAMAGES—*Miller* v. *Stewart*, 170.
See CONTRACTS—*Lambert* v. *King*, 662.
*Perret* v. *Sanchez*, 687.

PARENT AND CHILD.

1. The legal presumption, that the husband of the mother is the father of all children conceived during the marriage, can only be rebutted in the mode and within the time prescribed by law. *Dejol* v. *Johnson*, 853.

2. The right to disavow or repudiate a child born under the protection of the legal presumption, is peculiar to the father and can be exercised only by him or his heirs within a given time and in certain cases; and if the father renounces the right expressly or tacitly, it is extinguished and can never more be exercised by any one. *Ibid.*

3. The disavowal by the father must be made in a judicial proceeding, an action to which the child is a necessary party. If the father has never legally contested the legitimacy of a child born in lawful wedlock, mere oral and ex parte declarations of the father, or his wife, or of the child whose claim is contested, touching the legitimacy, cannot be received as evidence. *Ibid.*

See PRACTICE—*Greenwood* v. *New Orleans*, 426.

PARTITION.

1. The Judge in decreeing a partition must direct the manner in which it shall be made. *Harrell* v. *Harrell*, 549.

2. The partition spoken of by Art. 1449 C. C., applies only to partitions regular in form, as donations *inter vivos* or *mortis causa*, and not to a mere division of property without writing. Such divisions can only give rise to collations among the heirs, whenever a definitive partition is made. This case remanded for such partition under the plaintiffs' prayer for general relief. *Lacour* v. *Lacour*, 724.

PARTNERSHIP.

1. In an action for the liquidation of the affairs of a partnership, when one partner, the plaintiff, sets up a claim under express contract for compensation for extra services or labor, testimony is inadmissible to prove the value of the services of the other partner under a claim by reconvention on a *quantum valebant*. *Hill* v. *Matta*, 179.

2. No partner is entitled, unless under a special agreement, to any compensation, commission or reward for his services while employed in the partnership business. *Ibid.*

3. Where it does not appear to have been more the duty of one partner than another to collect debts due to the partnership, and the partner who undertakes to collect them has placed them in the hands of a competent attorney, and has acted in good faith, he ought not to be held responsible for the negligent or irregular acts of such attorney (or other competent agent) although the suit was brought in the name of the individual partner instead of the names of the joint owners. *Aiken* v. *Ogilvie*, 353.

4. One who is clerk and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity, without resorting to a suit for the settlement of the partnership transactions. *Alexander* v. *Alexander*, 588.

5. A sale made by two of three parties, of their interest in a commercial co-partnership, to the third partner, does not deprive the creditors of the partnership of their privilege upon such effects of the partnership as may be found in the succession of the latter partner, the vendee, at his death. *Succession of Beer*, 698.

For seizure of partnership property to pay debt of individual partner, See *Beauchamp* v. *Chacheré*, 851.

PAYMENT.

1. A tender of payment by the creditor in order to exonerate him, must be followed by a consignment or deposit of the money or notes. C. C. 2163, 2165; C. P. 405, 407, 412. *Walker* v. *Brown*, 266.

PAYMENTS, IMPUTATION OF.

See ACCOUNT—*Keane* v *Brandon*, 20.

PLEADING.

1. Where the plaintiff sued to recover the value of horses shipped on defendant's boat, and alleged to have died of a disease contracted in consequence of the negligence and want of skill of those in charge of the boat in removing the horses from one part of the boat to another, under the general denial it is competent for the defendants to give in evidence all circumstances going to relieve the act of removal, of the character of a tortious violation of the contract between the parties, by assigning a reasonable necessity for such removal.

*Elliot* v. *Steamboat James Robb*, 12.

2. The defendant, in his answer to a suit for money loaned to him, averred that the money was not loaned but given to him, partly in payment of an antecedent indebtedness, and partly as a remunerative donation for services rendered. *Held:* That this was not an admission that the defendant was ever indebted to the plaintiff, and that the burden of proof rested on the plaintiff to establish that the transaction was a loan.

*Rohrbacker* v. *Schilling*, 17.

3. In an action on a valued policy of insurance the plaintiff is not put on proof of interest in the object insured by a plea of the general issue.

*Kathman* v. *General Mutual Insurance Co.*, 35.

4. When the shipper has insured the freight, unless there is a special denial in the answer that he paid the freight in advance the fact need not be proved. *Ibid.*

5. The appointment of a tutor by a court of competent jurisdiction cannot be questioned collaterally; such appointment must be avoided by a direct action, or in the mode pointed out by law.

*Martin* v. *Jones*, 168.

6. As a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, but it cannot control a written description of the metes and bounds of the land claimed in which there is nothing ambiguous.

*Remy* v. *Municipality No. Two*, 500.

7. The party who relies on an exception dilatory in its nature, although arising on the face of the proceeding, must specially plead his exception and point out the particular defect upon which he relies.

*Scott* v. *Jackson*, 640.

8. In an action on a penal statute which must be strictly construed, it s necessary that the facts constituting the *gravamen* should be clearly and distinctly stated. *New Orleans* v. *Gordon*, 749.

9. Compensation must be pleaded specially. *Porche* v. *LeBlanc*, 778.

10. In a suit to remove the father from the tutorship of his minor, on the ground of notoriously bad conduct, the party should allege particular facts of which the defendant was guilty, in order to enable the court to determine whether such facts constituted "notoriously bad conduct."

*Edwards* v. *Morrow*, 887.

11. No cause of exclusion or removal from the tutorship is applicable to the father, except that of unfaithfulness of his administration and of notoriously bad conduct. C. C. 326 *Ibid.*

POLICE JURY.

1. The Legislature may constitutionally delegate to Police Juries authority to pass all such ordinances as they may deem necessary relative to roads and levees. *Hunsicker* v. *Briscoe*, 169.
2. The Police Jury may, in order to avoid the expense of expropriation of property, authorize the owners of the soil over which the road passes, to keep up gates by which the right of way may be secured to the public with the least injury to the owner. *Ibid.*

See CONSTITUTION—*Avery* v. *Police Jury*, 554.

PRACTICE.

1. The plaintiff had filed supplemental petition, after answer and reconventional demand by the defendant. A default was taken on the supplemental petition, which was afterwards confirmed *ex parte* upon the deposition of a witness examined under commission. The case did not stand fixed for trial at the time. *Held:* That such a proceeding was irregular and that no judgment should have been rendered on the supplemental petition, until the whole case had been regularly tried. *Knight* v. *Knight*, 59.
2. The plaintiff in an action is not bound to set forth, and at the same time accompany by a specific denial, matters of defence which the defendant may urge in his own behalf. *McRae* v. *Purvis*, 85.
3. A bill of exceptions should be taken or reserved at the time the ruling of the Judge in the matter complained of was made. If not then reserved, the Judge cannot be compelled on a subsequent day to sign a bill of exceptions. *State* v. *The Judge of the Second District Court*, 113.
4. When a motion is made to take the answers of parties to interrogatories for confessed, on the ground of their being evasive, the court must act on the motion, it cannot be referred to the jury to determine on the merits of the cause. *Knox* v. *Thompson*, 114.
5. As a general rule, it is too late, after the evidence has been closed and the argument commenced, to allow new issues of fact to be made. The plea of payment, however, is highly favored. Courts always lean to the correction of an error that works injustice, and the strict rules of practice may, with more propriety, be relaxed, when the parties litigant are not the original contracting parties. The rule relaxed under the facts of this case. *Succession of Regan*, 116.
6. Judgment reversed where rendered on issue joined by defendant, a married woman, unauthorized by her husband or the court. *Tillet* v. *Upton*, 146.
7. The husband being sued with the wife, and both cited, the plaintiff might have made his judgment by default final on proving his demand, but it must appear from the record that such proof was made. *Ibid.*
8. The summary proceeding by rule can have place only in those cases expressly provided for by law. *Sumner* v. *Dunbar*, 182.
9. In the case of respite, which differs essentially from a surrender, one creditor cannot, by rule, contest a judgment and mortgage resulting from the recording of it, of another creditor. He must, for such purpose, resort to an ordinary action. *Ibid.*

PRACTICE (*Continued*).

10. The fees for services of an attorney at law, although he has acted under an appointment by the court, as tutor *ad litem*, for minors, cannot be recovered in a proceeding by rule, after the determination of the litigation in which he has been employed. *Nolan* v. *Taylor*, 201.

11. There was error in condemning the plaintiff to pay any of the costs of suit. The costs produced by the call in warranty should be borne by the defendant. *Lacour* v. *Watson*, 214.

12. There is no law authorizing the court to appoint a curator *ad hoc* to represent the slaves of a testator in a suit brought by his forced heirs to annul the disposition of the will enfranchising them. *Molaison* v. *Hébert*, 232.

12. When the defendant had no acknowledged domicil or residence in the parish in which he was sued, *held*, that the return of the Sheriff that he had left the copies of the petition and citation at defendant's place of residence in the parish, with a white person over the age of fourteen years, "residing at said residence," was manifestly bad. *Flynn* v. *Rhodes*, 239.

13. The judgment rendered against the defendant after default thereupon, was null and void, as the defendant made no appearance in the cause. *Ibid.*

14. As the plaintiff, previous to bringing his action to annul the judgment, made a tender of the amount for which his rights in the succession had been sold, and which had gone to the payment of his judgment debtor, it was not necessary to make him a party to the suit to annul the Sheriff's sale. *Dearmond* v. *Courtney*, 251.

15. The proper mode of seizing a debt existing in the form of a judgment, is a notification of seizure by the Sheriff to the judgment debtor. *Monticon* v. *Mullen*, 275.

16. The husband has under his control personal actions to which his wife is entitled, but the joinder of the wife in the suit does not destroy the action. *Barton* v. *Kavanaugh*, 332.

17. The remedy given to third persons by opposition is limited to the cases specified in the Code of Practice. Such third persons may, as in a separate action, obtain an injunction and arrest the seizure of the property he claims, but cannot assail the regularity of the plaintiff's proceeding against the defendant in the seizure. *Romagosa* v. *Nodal*, 341.

18. An order rendered, but not entered at the time, may be entered *nunc pro tunc* in proper cases. *Ferguson* v. *Millaudon*, 348.

19. Plaintiff sued originally upon a *quantum meruit* for materials furnished and work done in building a house, and afterwards, by an amendment admitted by the court, set up a written contract. (10 An. 61.) On the case being remanded, the defendants objected to the action being maintained against them, because they had not been put in default. *Held:* That this case does not come within the rule relied on by defendants. *Roper* v. *Magee et al.*, 409.

PRACTICE (*Continued*).

20. When a party acknowledges service of a rule on him to set aside a judgment, and contests it on its merits, it has the effect of a waiver of all exceptions to the form of proceeding. *May* v. *Ball*, 416.
21. The father and mother, while their children are under their authority, may appear for them in court in any kind of civil suit in which they may be interested. *Greenwood* v. *New Orleans*, 426.
22. The interest of the parents does not conflict with that of their children, on account of the usufructuary interest the parents have in the property of their children. *Ibid.*
23. Interlocutory orders made in the progress of a cause have their effect without being signed by the Judge.
*State* v. *The Judge of the Fifth District Court*, 455.
24. A party intervening in an attachment suit and claiming a privilege on the property attached, is bound to see that his intervention is properly put at issue and brought to trial. *Yale* v. *Hoopes*, 460.
25. When no default is taken and no issue joined on the petition in intervention, the plaintiff may proceed to render his judgment by default against the defendant final, without the cause being fixed for trial.
*Ibid.*
26. The intervention falls with the decision of the main suit. *Ibid.*
27. The proper mode of testing the rights of one claiming the vendor's privilege on property attached, is not by way of intervention but by third opposition. *Ibid.*
28. Granting leave to defendants who have been joined in an action for damages, to have separate trials, rests in the discretion of the Judge who tries the case. *Clement* v. *Wafer*, 599.
29. Plaintiff objected to defendants filing an amended answer. *Held:* That he was properly allowed to do so. The matters set up in it having an important bearing on the merits of the case. *Ibid.*
30. A party who excepts to the proceedings in a cause in which he is interested, must show in his bill all the facts, not otherwise of record, necessary to give the act complained of its erroneous complexion.
*State* v. *Jackson*, 679.
31. A bill of exceptions which does not state the grounds on which it is taken cannot be examined. *Porche* v. *LeBlanc*, 778.

See ACTION—*Williams* v. *Close*, 873.
See CONTINUANCE—*Jeter* v *Heard*, 3.
See EXECUTORS (Homologating tableau)—*Succession of Minvielle*, 72.
See ACTION—*Waldo* v. *Angomar*, 74.
See NEW TRIAL—*Barrow* v. *Landry*, 83.
See EXPERTS—*Thompson* v. *Parrent*, 183.
See COURTS—*State* v. *Wilson*, 189.
See JURY—*State* v. *Lenares*, 226.
See GARNISHEE—*Gaty* v. *Franklin Insurance Co.*, 272.
See PROVISIONAL SEIZURE—*Roguet* v. *Steamer Clarke*, 300.
See SUCCESSION—*Succession of Harrel*, 337.
See JUDICIAL SALE—*Brown* v. *Kendall*, 347.
See ELECTIONS—*Augustin* v. *Eggleston*, 366.
See SUPREME COURT—*State* v. *Judge, &c.*, 405.
*State* v. *Kitty*, 805.
See DELIVERY BOND—*Brander* v. *Bobo*, 616.
See EXECUTORY PROCESS—*Jenkins* v. *Grigsby*, 642,
See SALE—*Lesseps* v. *Wicks*, 739.

PRESCRIPTION.

1. The universal legatee cannot set up the will of the testator as a just title and make it the basis of the prescription of ten years.

*Griffon* v. *Blanc*, 5.

2. The prescription of one year, under Art. 3499 of the Civil Code, as to workmen, laborers and servants, only applies where the employment has been by the day or by the month; it does not apply to claims for the value of work done by the job, and of materials furnished for such.

*Keys et al.* v. *Riley*, 19.

3. Endorsements of partial payments in the handwriting of the holder of a written obligation, are not of themselves sufficient proof of an interruption of prescription. They will, however, when other facts are shown leading inevitably to the conclusion that the holder of the obligation made the endorsements before prescription was acquired in favor of the debtor, and against his own interest. *Beatty* v. *Clement*, 82.

4. The heir who has permitted thirty years to elapse without having done any act showing an intention to accept the succession is barred by prescription from any right as heir. C. C. 1023.

*Succession of Waters*, 97.

5. A suit brought against the husband on notes due by the community, interrupts prescription as to the heirs of his deceased wife. C. C. 3517.

*Succession of Regan*, 116.

6. When defendant's title is not traced to a sovereign grant, possession in good faith under successive purchases from private vendors for more than ten years, will not constitute a title by prescription against one who claims under a patent from the United States, issued within ten years previous to the institution of the suit.

*Laidlaw* v. *Landry*, 151.

7. In the absence of any other evidence, of the date of the actual severance of the land from the public domain, the date of the patent must be considered as the time when the severance took place. *Ibid.*

8. The burden of proof rests with the party pleading prescription to show affirmatively a state of facts which will sustain the plea. *Ibid.*

9. When an attorney's fee is contingent upon his success in collecting money for his client, the fee not being exigible until the money is collected, prescription against the attorney's demand does not begin to run from the date of the judgment he has obtained for his client.

*Morgan* v. *Brown*, 159.

10. Although the action for a reduction of the price of land on the ground of deficiency in quantity be prescribed, it may nevertheless be set up as a means of defence against a demand for the price.

*Miller* v. *Tate*, 160.

11. The acknowledgment of a debt by a married woman in the presence of her husband, and tacitly assented to by him, will interrupt prescription.

*Orcutt* v. *Bennett*, 178.

12. The Statute of 1852, which declares "that the prescription of all other open accounts, the prescription of which is ten years, under existing laws,

PRESCRIPTION (*Continued*).

shall be prescribed by three years," is not applicable to the case of a demand for balance of subscription to the capital stock of a corporation.
*New Orleans and Jackson Railroad Company* v. *Estlin*, 184.

13. An inscription of a mortgage which is not renewed until after an interval of ten years, ceases to have effect against any third person having an adverse interest. *Succession of Flower*, 216.

14. The subsequent reinscription only gives its effect from the date of such reinscription. *Ibid.*

15. Prescription against the creditors of an insolvent is suspended by a surrender of his property, but the same principle is not applicable to successions whether solvent or insolvent. *Ibid.*

16. The right of a mortgage creditor is lost by the failure to reinscribe within ten years, although before the ten years had expired the mortgagor had died. *Ibid.*

17. When there has been fraud on the part of the vendor, and no proof that he had any knowledge of the existence of a redhibitory vice in the slave sold, the redhibitory action is prescribed in one year from the sale.
*Riddle* v. *Kreinbiehl*, 297.

18. in an action to recover a part of the price unpaid, the vendor may set up the redhibitory vice as matter of defence, although more than a year has elapsed since the sale. He cannot, however, by a reconventional demand, after the lapse of one year, recover back the part of the price which has been paid. *Ibid.*

19. The petition charged that the defendants had unwarrantably and illegally destroyed a certain railroad; that the iron and materials of the road were the petitioners property, and that the iron and materials were kept from the petitioner by the defendants, and claimed the value of said materials. *Held:* That the action was one of damages for a tort, and the prescription of one year applicable to it.
*Harper* v. *Municipality No. One*, 346.

20. Where several persons buy a tract of land, in the name of one of themselves, for the purpose of dividing it into lots and squares, and selling the same at a profit to be shared among them, the notes and assets, as well as the unsold lots, are subject to the action of partition, and a suit by one of the partners against the other, to compel him to account for sales made by him, will not be barred by the prescription of ten years
*Aiken* v. *Ogilvie*, 353.

21. In assumpsit of a debt *conditionally*, prescription does not commence to run until the condition is accomplished. *Stewart* v. *Marston*, 356.

22. Prior to the Act of 1837 the office of curator of a vacant estate terminated in one year from the date of his appointment. The action to compel the curator of a vacant estate to render his account seems to be of the nature of the action of mandate, and subject to the prescription of ten years from the expiration of his office.
*Wilson* v. *McGreal*, 357.

PRESCRIPTION (*Continued*).

25. The character the plaintiff has given to his action by his pleadings must determine the prescription applicable to it. *Ibid.*

24. The Act of the Legislature of the 5th March, 1852, having fixed the prescription of the accounts of merchants and all other open accounts at three years, whereas the prescription was previously ten years, when more than one-third of the time required for the prescription under the former law had elapsed. *Held:* that the account sued on was prescribed after the lapse of two years (being two-thirds of the time required under the new law) from the date of the promulgation of the statute to the institution of the suit. *Tate* v. *Garland*, 525.

25. The Act of the Legislature of 1848 abolishes the distinction between residents and absentees in matters of prescription. *Ibid.*

26. There is no prescription of obligations of individuals for the security of stock subscribed and unpaid, so long as the liquidation of the company continues. *Succession of Shropshire*, 527.

27. The claim of an agent against his principal for services in the selling of lands, is not embraced in the words "open accounts," which, by the Statute of 1852, are prescribed against in three years.
*Cooper* v. *Harrison*, 631.

28. Ten years is the only prescription against such a demand. *Ibid.*

29. A credit appearing on a note, will not interrupt prescription, unless it is shown where and by whom the payment was made.
*Maskell* v. *Pooley*, 661.

30. Where a judgment creditor seizes property on execution and a third opponent sets up a privilege on the thing seized, it is competent for the seizing creditor to plead prescription against the opponent, nor will the circumstance that the opponent, since the filing of his opposition, obtained a judgment on his claim in a different court, affect the seizing creditor's right to make the plea. *Ibid.*

31. An action brought against the principal debtor, interrupts the prescription on the part of the surety. C. C. 3518.
*Ferguson* v. *Glaze*, 667.

32. A nonsuit entered up against a party who does not appear when called in court, is not such an abandonment of the suit, as prevents it from interrupting prescription. *Devalcourt* v. *Dillon*, 672.

33. No effect can be given to a plea of prescription where the boundaries are not established in a manner to show to what property the plea must be applied. *Martin* v. *Breaux*, 689.

34. Under Art. C. C. 2720, which is held to apply to all persons except menial servants, the right of action of a pilot, who has been discharged "*without any serious ground of complaint*," for his wages for the full term for which he was employed, accrues immediately upon his discharge, and the prescription of one year against his *suit* will commence when the right of action has accrued. *Shoemaker* v. *Bryan*, 697.

PRESCRIPTION (*Continued*).

35. An action to recover wages of the officers, sailors and crews of ships and other vessels, is prescribed in one year, whether they are employed by the season or by the month. *Martin* v. *Bryan*, 722.

36. An action of debt upon a judgment rendered in another State of the Union, is a personal action, the prescription of which is governed by Art. 3508 of the Civil Code. *Deal* v. *Patterson*, 728.

37. Since the Act of March, 1848, (promulgated 4th April, 1848,) placing absentees and non-residents on the same footing with residents of the State, in relation to the laws of prescription, ten years will suffice to enable a judgment debtor to prescribe against his creditor, though the latter be a resident of another State. *Ibid.*

38. When a statutory change is made in regared to a particular term of prescription, the time anterior to the promulgation of the change is reckoned according to the old law, and the subsequent time according to the new enactment. *Ibid.*

39. Thirty years uninterrupted possession is required to enable a party to prescribe beyond his title. *Gray* v. *Couvillon*, 730.

40. To sustain the plea of prescription under Art. 849, C. C., it is necessary not only to show a possession of ten years, but also that this possession has been held by boundaries fixed according to a common title or different titles. Art. 829, and the following articles, prescribe the mode of fixing boundaries, and the Art. 849 must be considered in connection with these. *Ibid.*

41. By the "action of workmen, laborers and servants for the payment of their wages," which is prescribed by one year under Art. 3499, C. C., is meant only the action of such workmen, laborers and servants against their immediate employers who hire them by the day or by the month, and not the action of a contractor who undertakes a specific job. *Setter* v. *Landry*, 842.

42. The action on the contract is not barred by one year, although the charge is made up partly of the items for which they had to pay workmen and material men. *Ibid.*

43. The prescription applicable to a demand by the holder of a note is not applicable to the demand of the surety for re-imbursement against his principal. The latter is a personal action which is barred only by ten years. *Linton* v. *Wikoff*, 878.

See SALE—*Bennett* v. *Bennett*, 253.
*Templet* v. *Baker*, 658.
See PRIVILEGE—*Van Wickle* v. *Belle Gates*, 270.
See TAXES—*State* v. *Winfree*, 643.

PRINCIPAL AND AGENT.

1. An agent who has been instructed to insure, cannot take the risk upon himself as insurer; he cannot, if he does, recover from his principal premiums for insurance, but in case of loss he would be bound to indemnify his principal not as insurer but on the ground of having failed to comply with his instructions. *Keane* v. *Brandon*, 20.

The defendants were appointed a "Permanent Committee" to forward a scheme proposed at a public meeting of the citizens of New Orleans, of establishing a railway across the Isthmus of Tehuantepec, and in that capacity contracted with the plaintiff. It was held that the burden of proof, as to the terms of the contract, rested upon the plaintiff, and that to hold the defendants liable, he must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority. *Trastour* v. *Fallon*, 25.

2. In cases of this character, the controlling question is, whom did the employee trust? If no artifice or deception was used in making the contract, and the employee knew the capacity in which his immediate employer acted and looked to a special fund or to a projected company to reward him, he cannot hold the honest agent personally liable.

*Ibid.*

4. Where the mandatary has made no agreement for a compensation for his services, and it cannot be inferred, either from the nature of the employment or the relation of the parties, that it was in contemplation of both parties that the mandatary should receive compensation for his services—it is a case of a gratuitous procuration, and the mandatary is not entitled to compensation. *Lafourche Nav. Co.* v. *Collins*, 119.

5. The defendants, the factors of the plaintiff, effected insurance on their stock of tobacco and other merchandise in four different insurance companies. Some of the insurances were for six months, others for a year, and at different rates. The rate of insurance was equal to one-eighth of one per cent per month. The plaintiff, in the accounts rendered of sales of tobacco, was charged one-fourth of one per cent per month for insurance. *Held:* That the defendants were not to be considered as plaintiff's agents in the insurances they had effected, but they are to be considered as being themselves the insurers of the plaintiff at the rate of one-fourth of one per cent per month, and as having re-insured at the best terms they could obtain in the different insurance offices in the city. *Miller* v. *Tate*, 160.

6. The plaintiff's tobacco having been lost by fire, the defendants are not entitled to charge commissions on sales not actually made. Their liability to the plaintiff is that of insurers. *Ibid.*

7. The commissioners of the *McDonogh* estate are the mandataries of the cities of New Orleans and Baltimore, and derive no power from the will of the testator. (See case of *Society for relief Orphan Boys* v. *New Orleans and Baltimore*, 12 An. 62.)

*New Orleans* v. *Succession of McDonogh*, 240.

8. The commissioners and agents cannot stand in judgment for the cities without the authorization of the latter. *Ibid.*

9. Persons owning or chartering a steamboat, are bound by the acts of the Captain employed by them in matters appertaining to the regular business of the boat. *Mackey* v. *DeBlanc*, 377.

10. So also a planter for engagements entered into for him by his overseer acting strictly in the line of his employment. *Ibid.*

PRINCIPAL AND AGENT (*Continued*).

11. *A*, being indebted to *B*, deposits in his hands, merchandize to be sold, and the proceeds to be applied to the extinguishment of the debt. This constitutes a contract of mandate between *A* and *B*, which obliges the former to reimburse the latter, whatever necessary and useful expenses have been incurred in fulfilling the object of the mandate.

*Devalcourt* v. *Dillon*, 672.

12. Brokers may extend their responsibility beyond its limitations as fixed by Art. 2987 C. C., by assuming to themselves other functions than those imposed upon them by law and usage. Where such an agent has disobeyed instructions, he cannot rely upon a ratification of his acts by his principal, without showing that they were ratified after a disclosure of all the material facts. *Soudieu* v. *Faurès*, 746.

See ATTACHMENT—*Bullitt* v. *Walker*, 276.
See ATTORNEY-AT-LAW—*Morel* v. *New Orleans*, 485.
See USURY—*Gilly* v. *Berlin*, 728.

PRINCIPAL AND SURETY.

1. The seizure of property by the Sheriff under a writ of *fieri facias*, and his subsequent carelessness or neglect by which the benefit of the seizure is lost to the seizing creditor, in consequence of the destruction of the property seized, furnishes no ground to the sureties on an appeal bond, to resist the payment of the judgment.

*Grieff* v. *Steamboat Stacy*, 8.

2. The Sheriff, in such a case, may, by his neglect, become responsible to the defendant whose property was lost by his neglect, or to the plaintiff whose debt he has jeopardized; but the sureties on the appeal bond would only be subrogated to the defendant's rights on payment of the judgment, and not until then could they exercise any right of action against the Sheriff. *Ibid.*

3. Parties admitted to bail under bond, are, as it were, transferred from the custody of the Sheriff to the friendly custody of the sureties in the bond, who may at any time surrender the accused in discharge of the bond. *State* v. *Lazarre*, 166.

4. When the liability of the surety had been fixed by the same judgment in which the principal was condemned, *held*, that an agreement under which, without the formality of a Sheriff's sale, a twelve months' bond was given by the principal, to recover the debt and costs, as if the property seized had been adjudicated on a second crying for that amount, did not have the effect of releasing the surety.

*Hardesty* v. *Sturges*, 231.

5. A contract with the surety of a creditor to indemnify the surety against the consequences of his suretyship is, in its nature, a contract of personal warranty, recognized by Articles 378 and 379 of the Code of Practice. *Keane* v. *Goldsmith*, 560.

6. A right of action against one who has come under such obligation, accrues to the surety as soon as he has been condemned by a final judgment to pay the creditor, and it is not necessary that he should have paid the judgment to entitle him to proceed against one who was thus bound to indemnify him. *Ibid.*

PRINCIPAL AND SURETY (*Continued*).

7. Sureties on an appeal bond sought to relieve themselves from liability, on the ground that proper diligence was not used to make the money out of the principal debtor. *Held:* That it does not appear that by any act or even neglect of the creditor, a subrogation to his rights, mortgages and privileges, can no longer be exercised in favor of the sureties, and they are therefore bound. *Rawlins* v. *Barham*, 630.

8. Three persons signed a bond for the appearance of *D.*, charged with an assault with a dangerous weapon. Two of the sureties delivered *D.* in compliance with their obligation under the bond. *D.* escaped, after the delivery, and the State sought to hold defendant, the other surety, liable. *Held:* When one, of several sureties, on a single bond, avails himself of the privilege of surrendering the prisoner, it must be presumed to be done in the interest of his co-sureties, as well as of himself, and it absolves all, if it absolves one. *State* v. *Doyal*, 653.

9. *Non constat* that the endorser of a promissory note against whom a solidary judgment has been obtained with the maker, was a mere surety for the latter. *Manice* v. *Duncan*, 715.

10. Suffering a sale to be postponed, after a seizure under execution, is not *per se* a prolongation of the term of payment to the judgment debtor, when the sale takes place sooner than it could have been forced in the usual course of legal proceedings. Nor will a mere waiver of forms and delays in the sale under execution discharge the co-debtor, where no resulting injury is shown. Where an execution has been returned, it will be presumed, in the absence of proof to the contrary, that it was ordered to be returned for sufficient reasons. A mere failure to execute the judgment will no more release the co-debtor than a forbearance to sue would have discharged the endorser. *Ibid.*

See ACTION—*State* v. *McDonnell*, 741.

PRIVILEGE.

1. Payments made by a factor of debts due by his principal, are considered as money advanced by the factor and without a subrogation to the rights of the creditor, the factor cannot claim any privilege arising from the nature of the debts thus paid. *Shaw* v. *Knox*, 41.

2. The terms "necessary supplies" furnished to a plantation, include such supplies only as are essential to the subsistence and management of the plantation. *Ibid.*

3. Factors who have furnished supplies to a plantation, as regards creditors having an equal privilege with themselves, can only claim a ratable proportion of the proceeds of the whole crop. *Ibid.*

4. As between the parties to a building contract, the privilege of the builder may exist without registry. *Thompson* v. *Parrent*, 183.

5. No privilege, as to third persons, exists in favor of the vendor of an engine and gearing for a sugar mill, if he permits it to be attached to a plantation, without having enregistered the contract of sale. *Gary* v. *Burguieres*, 227.

PRIVILEGE, (*Continued*).

6. The vendor's privilege on movables can only be exercised whilst such movables remain in the possession of the purchaser or where the vendor claims a preference on the price over the other creditors of the purchaser. *Penn* v. *Ott*, 233.

7. A privilege on a steamboat for damages, caused by non-delivery of freight, is lost at the expiration of sixty days from the date of the default and consequent liability. After that time elapses, a sequestration will not lie. *Van Wickle* v. *Steamer Belle Gates*, 270.

8. The furnishers of provisions to the boat's crew are not furnishers of "materials" in the sense of Art. 983, No. 3, of the Code of Practice. *Roquest* v. *Steamer B. C. Clarke*, 300.

9. The landlord has a privilege upon the property of the defendant not yet removed from the leased premises. His privilege is continued in force by the order of the court directing the Sheriff to retain in his hands the proceeds of the property seized. *New Orleans* v. *Vaught*, 339.

10. The keeper of a livery stable has no privilege by law upon carriages and horses kept in his stable. *Powers* v. *Hubbell*, 413.

11. When the vendee of a carriage convenanted with his vendor not to sell it to the prejudice of his vendor's right, and a subsequent purchaser assumed the payment of the price and received possession from the original vendor—*Held;* That the vendors privilege still existed. *Ibid.*

12. The privilege awarded by Art. 3184 of the Code to furnishers of necessary supplies to a plantation, does not extend to a crop entirely cultivated and gathered after the supplies were furnished, so as to take effect after the plantation has been sold. *McCutchon* v. *Wilkinson*, 483.

13. The privilege under that Article "on the product of the last crop and the crop at present in the ground," must be confined to the crop cultivated, standing or being gathered and taken off at the time the supplies were furnished, it cannot be extended to the crop subsequently planted and sold with the plantation to a third party. *Ibid.*

14. The limitation of sixty days does not apply in the case of a privilege of a vendor of coal furnished to a steamboat when the coal had never been received on the boat, but was piled up on the bank of the river. *Succession Broderick*, 521.

15. The privilege of the vendor of the engine, boilers and machinery of a vessel, which form a component part thereof, is a privilege under Art. 3204 of the Code, and is lost in the sixty days after the materials were furnished. *Ibid.*

16. A judgment obtained by the furnisher of such materials, with a lien and privilege, is not binding upon other creditors who were not parties to the judgment. *Ibid.*

17. A pledge, as well as a mortgage, may be made to secure an obligation not yet risen into existence. *Wolf* v. *Wolf*, 529.

PRIVILEGE (*Continued*).

18. Privileges must be regulated by the law of the forum, and none can be claimed except such as are granted in the Civil Code, Art. 3152, and statutes amendatory thereof. *Swasey* v. *Montgomery*, 800.

See ATTACHMENT—*McGregor* v *Barker*, 289.
See PRACTICE—*Yale* v. *Hoopes*, 460.
See PARTNERSHIP—*Succession of Beer*, 698.

PROVISIONAL SEIZURE.

1. The writ of provisional seizure cannot be sued out without a bond being given by the plaintiffs, except in the cases expressly enumerated in the Code of Practice. *Roquest* v. *Steamer Clarke*, 300.

PUBLIC LANDS.

1. Plaintiffs' claim to 574 63-100 *arpens* of land was confirmed by Act of Congress of 28th February, 1823. He claimed 574 63-100 *acres*, and in 1849 his claim was surveyed as containing this latter quantity, and the survey approved. *Held:* That the plaintiffs' title to the whole 574 63-100 *acres* would no doubt be good against third persons, and against any one not claiming under the United States Government; but that it is not so as against a purchaser from the Government, whose patent must prevail against a mere survey without title. *Hébert* v. *Woods*, 211.

2. A sale of a preëmption right acquired under the Act of Congress of 1841, made prior to the issuing of a patent, is null and void. *Arbour* v. *Nettles*, 217.

3. The distinction between a transfer of the right of preëmption and a transfer of the occupancy and improvement upon which the right of preëmption is based, commented on, and declared not applicable to this case. *Ibid.*

4. It is only the possessor in good faith, believing himself to be the owner, who can recover from the true owner the value of ameliorations inseparable in their nature from the soil. *Gibson* v. *Hutchins*, 545.

5. Although a settler upon public lands who hopes to obtain a title under the preëmption laws is not a trespasser, he has no claim against a patentee of the Government for the ameliorations made upon the land of which he has had the use. He has no claim against the Government for the value of the improvements made, and the assignee of the Government takes the land free from any liability. *Ibid.*

6. A mere settler, even with the hope of preëmption, until he actually makes his entry, has no title, and improvements made by him on public land are presumed to be for his own benefit and at his own risk. *Ibid.*

7. The Surveyor General of the United States for the State is the proper person to certify the township maps. *Lawrence* v. *Grout*, 835.

8. The reservation in the Act of Congress of March 2d, 1849, which devotes a part of the swamp lands to the State, of lands which are "*claimed or held by individuals*," does not apply to persons who claim or hold lands without a sufficient basis for perfecting a title thereto. *Ibid.*

9. No claim can be enforced for improvements made on land while the title is in the sovereign. *Ibid.*

RAILROADS.

See CORPORATIONS.

RECEIVER.

1. What the parties might do by a power of attorney, the court may, when their interest require and the parties are properly before the court, order to be done. *Helme* v. *Littlejohn*, 298.
2. A receiver may be appointed by the court, notwithstanding the death of one partner and the appointment of an executor to administer his estate. *Ibid.*
3. The decree of the court appointing a receiver to collect the partnership assets is itself sufficient authority to him to institute a suit against a debtor of the partnership. The transcript of the proceedings in the suit in which he received his appointment need not be produced. *Ibid.*

REDHIBITORY ACTION.

1. When, at a public sale, the Deputy Sheriff proclaimed the negro sold to be unsound, the redhibitory action cannot be maintained by the purchaser on account of any latent defects, and parol evidence is admissible to prove such a declaration. *Phipps* v. *Berger*, 111.
2. The redhibitory action cannot be maintained when the purchaser of a slave permitted many months to elapse, after the first development of disease, without resorting to medical aid. *Williams* v. *Talbot*, 407.
3. An action of redhibition to set aside the sale of a slave on the ground that the slave had so little mind or sense as to be utterly worthless cannot be maintained. *McCay* v. *Chambliss*, 412.
4. Such a case falls within the Article 2497 of the Code as a defect apparent to any ordinary observer. *Ibid.*
5. Where the disease of which a slave died manifested itself within three days after the sale, but death was caused by a relapse not attributable to negligence on the part of the purchaser, *held*, that the sale should be avoided. *Cornish* v. *Shelton*, 415.
6. The presumption of the existence of a disease at the time of the sale, from its manifestation within three days after the day of the sale, may be rebutted by evidence. *Ibid.*
7. When the death of a slave is necessarily connected with and a direct sequence of the vice of character, it can then be no more regarded as a fortuitous event than a death which results from a vice of body. *Riggin* v. *Kendig*, 451.
8. *Held:* That value of a slave could be recovered where the slave was a notorious runaway, and died of a disease contracted while a runaway, and which was a consequence of exposure in the woods and eating of indigestible food. *Ibid.*
9. In the absence of a special warranty against a particular redhibitory vice, the knowledge of its existence on the part of the vendee at the time of the sale, although nothing was said on the subject, will protect the vendor from liability. *Edwards* v. *Glasson*, 586.

REDHIBITORY ACTION (*Continued*).

10. The knowledge of the existence of a disease in a slave by the buyer, which would deprive him of his action to rescind the sale for a redhibitory vice, must be clearly established. It will not be sufficient to prove merely, that there was some conversation about the health of the slave, although the vendee may have said "he knew all about the slave."
*Girod* v. *Belknap*, 791.

11. The redhibitory action cannot be maintained by the purchaser of a slave at auction where it appears that he was told by the auctioneer in answer to his own question, that the sale was made without any guarantee except of title, and that for a considerable time before he gave his notes in compliance with the adjudication he was aware of the extent, if any, to which the value of the slave was impaired by the alleged malady.
*Rochel* v. *Berwick*, 847.

12. From this a waiver of any objection to the purchase on the ground of unsoundness will be inferred. *Ibid.*

REGISTRY.

1. The registry of a draft on the owner of a saw-mill expressed on its face to be for the value of machinery furnished for the saw-mill, but which was not accepted at the time of its registry, is not a registry under Art. 3239 of the Civil Code against the owner which will affect the property in the hands of an innocent purchaser, although the machinery may have increased the value of the immovable by having become a part of it. *Shepherd* v. *Leeds*, 1.

2. The mere trespasser who is defendant in a petitory action, cannot defeat a *prima facie* title made out by the plaintiff on the ground of the non-registry of such title. *Coucy* v. *Cummings*, 748.

3. The registry may be made at any time and it does not concern a trespasser that it should be made at all. *Ibid.*

See MORTGAGE—*Porche* v. *Le Blanc*, 778.

RES JUDICATA.

1. If proper parties join issue upon questions either of law or fact, before a competent court, they must abide by the decision.
*Trescott* v. *Lewis*, 197.

2. The form of procedure, by a rule instead of an injunction, to arrest an execution, having been resorted to without objection, and a decision rendered thereon after issue joined on the merits—*Held:* That the defendant in execution, by whom the rule was taken, could not afterwards renew the litigation by resorting to an injunction. *Ibid.*

3. The judgment discharging the rule was precisely equivalent to a judgment dissolving an injunction, in lieu of which the rule was taken.
*Ibid.*

4. Such judgment, if not appealed from within the legal delay, would have the finality requisite to sustain the plea of *res judicata*, and although the time for appealing from it may not have elapsed, it precludes any further action of the court on the matters set up on the rule. *Ibid.*

RES JUDICATA (*Continued*).

5. A judgment homologating the assessment for expense of opening a street, voluntarily executed, has the force of the thing adjudged.
*Jamison* v. *City of New Orleans*, 346.

6. A decree pronounced by a competent tribunal, with the proper parties before it, although rendered by consent, being followed by its immediate execution, is a judgment capable of acquiring the force of the thing adjudged, and will produce that effect if no appeal be taken from it, nor action of rescission or nullity instituted within the period allowed by law. *Greenwood* v. *New Orleans*, 426.

7. The creditors of the succession of *W.* opposed the homologation of the administrator's account on several grounds, the principal one of which was, that the administrator had not enjoined an order of seizure and sale of a large portion of the property, when the claim on which it issued was tainted with usury. *Held:* That *W.* in his lifetime had resisted the claim on that plea, which had been decided adversely to him, and that it would not have been proper for the administrator again to set up the same defence. *Succession of Wilson*, 591.

8. Where the defendant, in an injunction suit prays, in his answer, for damages against the principal and sureties, and the judgment dissolving the injunction is silent on the subject of damages, it is equivalent to a rejection of the claim for damages, and the judgment is *res judicata* between the parties. *Rice* v. *Garrett*, 755.

9. Where in a suit to enjoin a seizure of property as illegal and to recover damages, the judgment maintaining the injunction is silent as to damages, it is equivalent to a rejection of the claim for damages, and will sustain the plea of *res judicata* in a subsequent suit for damages.
*Spencer* v. *Banister*, 766.

10. Where a rule to inflict on a syndic the penalty for not keeping a bank book, &c., &c., has been passed upon by the court in homologating the syndic's account, a second rule, on the same grounds, cannot be taken, unless the right was reserved in the dismissal of the first rule.
*Stadeker* v. *His Creditors*, 817.

11. Nor can the debtor take the rule on the pretence that he is the transferee of claims of creditors unless he has been legally subrogated to those claims. *Ibid.*

See EXECUTORS—*Succession of Anderson*, 95.
See TUTORS—*Porche* v. *Ledoux*, 350.

RESPITE.

See INSOLVENT PROCEEDINGS.

ROADS, LEVEES, &c.

1. The Act passed February 7th, 1829, relative to roads and levees, establishing a highway on the banks of bayous, &c., &c., does not apply to those streams or bayous running through a high country, not subject to overflow, and when the roads are made directly across the country and not along the winding of the stream. *Lyons* v. *Hinckley*, 655.

RULE.

See PRACTICE—*Sumner* v. *Dunbar*, 182.

SALE.

1. It is not necessary that the executor should make a tender of a transfer to the purchaser at public sale, in order to put the latter in default.
*Harris* v. *Harris*, 10.

2. Where real property is sold by written title, it is to the written will of the parties at the time of the sale that we must refer, to ascertain the object sold; we are not permitted to defeat the plain and ordinary meaning of their language by theories deduced from a presumed inadequacy of price or a comparison of the business talents of the vendor and vendee, even supposing such matters to be properly in evidence.
*Delogny* v. *David*, 30.

3. Where a particular claim comes precisely within the written description of the object sold, the vendor is estopped by the very distinct terms of his act of sale from saying he never meant to sell that claim, and the writing is conclusive upon the parties unless impeached for fraud.
*Ibid.*

4. Where, from the relation of the parties, as deduced from the answers to interrogatories, it is manifest that although both parties expected that the preliminary arrangements for a sale would be carried out, yet neither of them considered a sale had been concluded unaccompanied with conditions, a sale is not established. *Knox* v. *Thompson*, 114.

5. When a patent from the United States issued to the assignees of parties who had purchased a tract of land from the United States, and obtained the Receiver's receipt for the same, the title will not be invalidated on the ground that the act of transfer from the original purchaser from the United States to the patentees expressed that it was made for *value received*, without mentioning the price. *Helluin* v. *Minor*, 124.

6. The assignment was executed in the form recommended by the Land Department of the United States, and the patentee is the holder of the legal title. *Ibid.*

7. In a sale of a family of slaves, the avoidance of the sale as to one child affords no reason for avoiding the whole sale.
*Montan* v. *Whitley*, 175.

8. The sale of a right of preëmption acquired under the Act of Congress of the 4th of September, 1841, is null and void. *Penn* v. *Ott*, 233.

9. The purchaser of property at a succession sale delivered to the notary who was to prepare the act of sale and mortgage the cash instalment of the price, and also left with him the notes that were to be given in compliance with the terms of the adjudication. The executor of the estate afterwards asked the notary to give him $50 of the money on account to pay a bill, which the notary did. The notary afterwards absconded with the balance of the money. *Held:* That the loss should be borne by the purchaser.
*Succession of O'Keefe*, 246.

10. In order to make a valid tender the money must be placed in the power of the adverse party. If paid into court, it must be with the intention on the part of the debtor that the creditor shall be at liberty to take it out of court. If deposited with the notary, as the agent of both parties, it must be with the consent that the creditor shall be at liberty to withdraw it if he sees fit, otherwise the money is at the risk of the debtor.
*Ibid.*

SALE (*Continued*).

11. The money and notes could only have been placed at the risk of the succession or executor by a formal putting in default, or by a deposit for the benefit of the succession with the express or implied consent of the executor. *Ibid.*

12. Although the entire interest of a co-heir in a succession fallen to him may be seized and sold under execution at the instance of a creditor of the heir, the Sheriff is not dispensed from the necessity of seeing that a description of the property seized be given in as accurate a manner as the nature of the case will allow, so that bidders may know what they are bidding for, and the property of the debtor may not be unnecessarily sacrificed. *Dearmond* v. *Courtney*, 251.

13. When the proportion of the heir's interest in the succession was not given, either in the return of the Sheriff or the advertisement of the sale, and it did not appear how many heirs there were, nor of what property the succession consisted, nor what was the amount of the inventory, the sale was properly declared illegal and void. *Ibid.*

14. The adjudication to the husband of property as held in common with the minor children, when such property was in fact the paraphernal property of the deceased wife, does not divest the children of their title. *Bennett* v. *Bennett*, 253.

15. Nor is such a title sufficient to form the basis of prescription under Article 3444 of the Civil Code. *Ibid.*

16. A title to real estate does not pass by the adjudication of an auctioneer, unless he was authorized in writing to make the sale. *Cronan* v. *Succession of McDonogh*, 269.

17. Where a charge of false packing is made, in reference to cotton of various planters, in different sections of the country, under circumstances rendering the charge improbable, and the plaintiff urges a reclamation against the factor who sold him the cotton in lots, and without any particular representations as to quality, the cotton having been sampled by the seller and re-sampled by the purchaser, the latter must furnish *clear, consistent and cogent proof* to enable him to recover. Nor is it sufficient for the plaintiff to show that the cotton, or a portion of it, was *mixed;* it must also be proved that it was mixed to the prejudice of the buyer, and be made legally certain that the cotton was inferior to the samples by which it was sold. An unreasonable custom will not be enforced. But whether the cotton was *fraudulently* packed of mixed qualities, or was mixed by carelessness or accident, if it was *inferior* to the samples, by which it was sold, the buyer is entitled to relief, *provided* it was so packed that its defects could not have been discovered on simple inspection. *Mure* v. *Donnell*, 369.

18. The sampling of the cotton by plaintiff's brokers in Liverpool, and want of correspondence between the cotton he sold there and his samples taken there, cannot affect the defendant. The contract sued on, having been made here, must be governed by our laws. *Ibid.*

SALE (*Continued*).

19. Although there can be no sale without a price in money, it does not necessarily follow that the act is void because it wants this requisite of a sale; if there be no just cause for declaring it null, it may exist in another form as an exchange, a donation or a pledge.
*Wolf* v. *Wolf*, 529.

20. The vendor himself is not permitted to question the sale he has made, unless he has reserved a counter-letter, or relies on the answers of his adversary to interrogatories on facts and articles. *Ibid.*

21. Neither can any third party question the same without showing not only that it is simulated or fraudulent, but that it is also injurious to such third person who complains of it. *Ibid.*

22. There is nothing immoral in using the contract of sale as security for money advanced or to be advanced. *Ibid.*

23. The title of owner, under such a contract, must necessarily embrace that of pledge, and enable a party clothed with the legal title to protect himself for advances, on the expectation of which the sale was made.
*Ibid.*

24. Under the Code of 1825 the purchaser, in case of eviction, can recover from his vendor only such increase in the value of the property as the parties had in contemplation at the time of the sale. *Weber* v. *Coussy*, 534.

25. The right of an heir to an inheritance is not a litigious right within the meaning of Article 2630 of the Civil Code. Such a right may be sold. C. C. 2426. *Grayson* v. *Sanford*, 646.

26. The exclusion of warranty in an act of sale is not evidence of bad faith on the part of the purchaser. But where the vendee in an act of sale declares that he is acquainted with the title, and when it is exhibited, the title appears defective, there is made out against the purchaser a *prima facie* case of the want of that good faith necessary in order to prescribe.
*Templet* v. *Baker*, 658.

27. The unpaid vendor of a slave sold by private act unrecorded, may enforce the implied dissolving condition against his vendee, to the prejudice of the mortgage creditor of the latter. *Johnson* v. *Bloodworth*, 699.

28. The signature of the vendee to an act of sale *sous seing privé*, is not necessary under the provisions of our Civil Code, which does not contain the Article 1325 of the Code Napoleon. Under our law a sale of movables may be made by parol; but if the vendor chooses to make the sale in writing, his signature to the act is good proof against him, although without the signature of the vendee. The expression of Art. 2239 of the Civil Code, "*between* those who have subscribed it," is synonymous with *against* those who have subscribed it. A party against whom an act under private signature is offered must either acknowledge or deny his signature. The burthen of proof of a simulation is thrown on the defendant who alleges it. A special plea always controls, so far as it goes, the general issue. A party is not allowed to vary or destroy his own voluntary written agreement, by any thing short of written evidence, which includes answers to interrogatories on facts and articles.
*Lesseps* v. *Wicks*, 739.

SALE (*Continued*).

29. Where a sale is made with the right of redemption, the right must be exercised within the time agreed on, otherwise the purchaser becomes irrevocably possessed of the thing sold. C. C. 2548.

*Bair* v. *Abrams*, 753.

See REGISTRY—*Shepherd* v. *Leeds*, 1.
See SUCCESSION—*Harris* v. *Harris*, 10.
See LITIGIOUS RIGHT—*Lackey* v. *Tiffin*, 53.
See MINORS—*Succession of Morgan*, 158.
See PUBLIC LANDS—*Arbour* v. *Nettles*, 217.
See PRIVILEGE—*Powers* v. *Hubbell*, 413.
See EVIDENCE—*Martin* v *Drumm*, 494.
*Bair* v. *Abrams*, 753.

SALE JUDICIAL.

1. When the plaintiff in a suit for a partition sets up title to an undivided half of property in defendant's possession, claiming to have derived title thereto under a Marshall's sale, the defendant not claiming title to the interest of the seized debtor in the object thus sold, cannot contest the validity of the Marshal's sale for the want of formalities which were intended by law for the protection of the judgment debtor alone.

*Oakey* v. *Aiken*, 11.

2. When neither the judgment debtor nor any third party claims an adverse interest in property thus sold, the want of an appraisement of the property is not such an informality as will avoid the sale.

*Ibid.*

3 The Sheriff's return that property sold by him was duly appraised is sufficient in the absence of any rebutting evidence.

*Waddell* v. *Judson*, 13.

4. The assignee of a bank mortgage which, by the charter, is not affected by a succession sale, has the same right as the assignor to disregard such sale. *Beatty* v. *Clement*, 82.

5. Where property is offered for sale by the Sheriff under a writ of *fi. fa.*, on a credit, and the person to whom it is adjudicated does not offer such sureties as the Sheriff is willing to accept, nor take any proceedings against the Sheriff to force him to accept the sureties offered, the adjudication does not of itself confer a title. The regular course for the Sheriff in such a case is to offer the property again for sale immediately under the same writ, but if it is afterwards regularly sold by the Sheriff under the seizure of another creditor, the purchaser acquires a valid title. *New Orleans* v. *Pellerin*, 92.

6. Where, to enforce a mortgage containing the pact *de non alienando* property had been sold under an order of seizure and sale, prosecuted contradictorily with the third possessor, who was an absentee, by the appointment of a curator *ad hoc*, and when the order of sale, and all the proceedings under it, were subsequently homologated by a monition; *Held:* That the judgment could not be collaterally attacked by one claiming to have derived his title subsequently from such third possessor. *Laforest* v. *Barrow*, 148.

SALE JUDICIAL (*Continued*).

7. The purchaser in possession under such a sale cannot be disturbed in his title, on the ground of irregularities and defects in the executory proceedings, from which the parties in interest might at the time have been relieved by appeal. *Ibid.*

8. The vagueness and uncertainty in the description of the property in the act of mortgage will not be permitted to operate to the injury of a purchaser in good faith who went into possession under the sale of the property, which was understood at the time to be the object of the mortgage and sale under it. The notice with which the parties under whom a claim is set up adverse to the purchaser, is chargeable, is sufficient to vest in the purchaser a valid title to the land which he went into possession of under the sale, notwithstanding an uncertanty in the description as to the land sold. *Ibid.*

9. The first section of the Act of the Legislature of the 10th of March, 1847, conferring upon administrators and other representatives of a succession, the power of acting as auctioneer in the sale of the property of the succession, was not abrogated by the Act of the 7th of April, 1847, directing the Judge of the court to order the sale to be made by the Sheriff of the parish or such auctioneer as the parties might name.
*Lafiton* v. *Doiron*, 164.

10. The two Acts passed at the same session are not so utterly inconsistent with each other as to be wholly irreconcilable. *Ibid.*

11. A judical sale made to effect a partition among co-heirs, has the effect of extinguishing mortgages given by some of the heirs on their undivided portions, and of transferring such mortgages to the proceeds of the sale. *Finley* v. *Babin*, 236.

12. A judgment debtor is at liberty to waive the formalities of the law, so far as they exclusively affect his personal interests.
*Mullen* v. *Harding*, 271.

13. A *bona fida* purchaser at a Sheriff's sale will be protected against any attack upon his title upon the ground of informalities, unless the plaintiff show injury to himself in consequence of such informalities. *Ibid.*

14. It is the duty of the syndic in selling a slave at auction to declare the existence of any disease in the slave known to him, and which could not be discovered on simple inspection. *Richardson* v. *Bell*, 296.

15. Where he has failed to do so, the sale will be rescinded on the ground of such redhibitory vice. *Ibid.*

16. Where the existence of the disease before the sale to the knowledge of the vendor is clearly shown, a *post mortem* examination is not necessary.
*Ibid.*

17. A Sheriff's deed is a title translative of property, and the title and possession under it cannot be treated by a third person as a nullity.
*Brown* v. *Kendall*, 347.

18. Where the holder of two notes secured by mortgage on the same property, at the maturity of the first note obtained a judgment on it, with preference on the proceeds of the sale of the mortgaged property, which

SALE JUDICIAL (*Continued*).

being sold under his execution, did not bring a sufficient amount to satisfy both notes. *Held:* That the *fi. fa.* issued under the judgment, should have been first satisfied in full, and the balance held by the purchaser and judgment creditor, who bought in the property, to meet the other note *pro tanto*, when it became due. *Hynes* v. *Morin*, 742.

19. The plaintiff in the seizure, who was the holder of both of the notes, not having asked for a sale of the property on such terms of credit for the balance of the price, as would correspond with the falling due of the second note, the Sheriff had no right to apply the price first to the outstanding note in the hands of the seizing creditor, and thus leave a balance unpaid on the execution under which the property was sold.

*Ibid.*

See ESTOPPEL—*Gottschalk* v. *De Santos*, 473.
*Mullin* v. *Follain*, 888.

SEIZURE AND SALE.

See SALE JUDICIAL—*Laforest* v. *Barrow*, 148.

SEQUESTRATION.

1. When the husband and wife both appear as plaintiffs in an action in revendication of the paraphernal property of the wife, the real plaintiff is the wife, authorized and assisted by her husband.

*Goodin* v. *Allen*, 448.

2. When in such case the affidavit to obtain a sequestration was made by the husband only, and he alone signed the sequestration bond, *held*, that the sequestration was properly dissolved. *Ibid.*

3. Where property had been sequestered and was sold by the Sheriff, at the instance of plaintiffs, for cash, pending the suit, as perishable and to save costs, the effect of the Sheriff's sale, under the order of court, was to transfer the legal custody of the officer from the property itself to its proceeds; and the plaintiffs in the sequestration suit could not, by becoming themselves the purchasers of the property at the Sheriff's sale, transfer the legal custody of the sequestered property from the Sheriff to themselves by withholding the price.

*Field* v. *Broderick*, 552.

4. Plaintiff need not, in order to sustain a sequestration, swear that he fears defendant will conceal, part with, or dispose of, the property sequestered. It will be sufficient if he make oath of his interest in the property sequestered, and that he fears that defendant will send it out of the jurisdiction of the court during the pending of the suit.

*Anderson* v. *Stille*, 669.

SERVITUDE.

1. Under the law which prescribes the obligation of proprietors of lands bordering upon the rivers to suffer the servitude of a levee for the use of the public, the soil alone owes the servitude.

*Mithoff* v. *Carrollton*, 185.

2. When, for the public safety, it becomes necessary to construct the levee on ground on which buildings had been erected by the proprietors of

SERVITUDE (*Continued*).

the soil at a time when no immediate servitude was due to the public, and the buildings are demolished for that purpose, the owners are entitled to be compensated for their value, to be estimated at the time they were taken for public purposes. *Ibid.*

3. By Art. 763 of the Code, which declares: "The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title with respect to perpetual and apparent servitude thereon," is meant the disposition which the owner of two or more estates has made for their respective use.

*Gottschalk* v. *De Santos*, 473.

4. The intention to create a servitude for the respective estates, will not suffice, nor will it suffice that it was partially established, it must have been perfected in such a manner as to be useful to the adjacent lots.

*Ibid.*

5. Article 446 of the Civil Code does not establish against the proprietor of the soil, on the banks of navigable streams, a servitude in favor of the public at large, *for all purposes*, but only for such as are incident to the nature and the navigable character of the streams washing the land of such proprietor. *Lyons* v. *Hinckley*, 655.

6. The erection of a verandah of the same width with the street, in front of one's house, is not an infringement of the rights of the owner of the adjoining tenement and cannot be complained of as in violation of the Articles of the Civil Code regulating the servitudes of light and view.

*Durant* v. *Riddell*, 746.

7. The Art. 671 C. C. being derogatory of the right of property must be strictly construed. The right granted thereby to the first proprietor of lands in cities, who builds, to take possession of the land of his neighbor for the foundation of his building, must be confined to the side walls, and cannot prevent the latter, who afterwards builds, from occupying the whole front of his land, but he has no right to avail himself of the side wall before paying half the cost of its execution.

*Jamison* v. *Duncan*, 785.

See POLICE JURY—*Hunsicker* v. *Briscoe*, 169.

SHERIFF.

1. When the Sheriff, before the return day of the writ, had notified the plaintiffs of his release of the seizure of a slave on account of an adverse title set up by another, and had called upon both parties to point out property subject to seizure, which they failed and refused to do. *Held:* That the subsequent neglect of the Sheriff to return the writ on the return day, did not subject him to the statutable remedy by rule, which is not applicable to such a case. The plaintiff should have resorted to an ordinary action for damages. *LaSelle* v. *Whitfield*, 81.

2. Where the Sheriff is incapable of acting by reason of interest and there is no Coroner of the parish, the Judge may appoint a special officer to attend the jury during the trial. *Harbour* v. *Scott*, 152.

3. The Sheriff has no authority to receive money as security for the appearance of persons accused of crime. *State* v. *Reiss*, 166.

SHERIFF (*Continued*).

4. The Sheriff may, in the exercise of a sound discretion, levy an execution on property apparently belonging to a third person, when he has good reasons to believe that the property is held for the purpose of sheltering it from the legal pursuit of the creditors of the debtor in execution, but he renders himself liable for damages if he seizes any other property than that of the defendant in execution.

*James* v. *Thompson*, 174.

5. A bond of indemnity tendered to the Sheriff, neither lessens nor adds anything to his obligations or duties, nor will it justify him in making an illegal seizure. *Ibid.*

6. The mere failure of the Sheriff to make a return of the execution within the legal delay will not subject him to the payment of the amount specified in the writ, if circumstances are shown to excuse his failure. *Ibid.*

7. Deputy Sheriffs are expressly authorized by law to represent the Sheriff in all duties confided to the latter. They have the power to receive an appearance bond and discharge the accused upon its execution, although the order of the Judge directed it to be taken by the Sheriff.

*State* v. *Wilson*, 189.

8. The Sheriff has a right to sue in his official capacity on a bond executed for the price of property sold by the Sheriff, and for which the bond had been executed in favor of his predecessor.

*Bell* v. *Keefe*, 340.

9. The Sheriff may sue upon and enforce the payment of a bond given by the defendants for property seized and sold by him in course of judicial proceedings, otherwise in cases of protracted litigation the right of parties might be impaired or lost by insolvency or prescription.

*Bell* v. *Keefe*, 374.

10. The Articles 703, 716, 717 and 718 of the Code of Practice apply to cases where the rights of parties are fixed and determined. *Ibid.*

11. The Act of 1846 prescribes the mode of proceeding in contesting the election of a Sheriff. The Supreme Court is not the proper tribunal to entertain such a contest, and cannot go behind the commission to examine the proof upon which the Governor acted in issuing it.

*State* v. *Hyams*, 719.

SIMULATION.

1. The Article 1988 of the Civil Code, which denies the revocatory action to a creditor when the contract of his debtor, which he seeks to set aside, was entered into before his debt accrued, has no application to cases of pure simulation. *Simpson* v. *Mills*, 173.

2. Where an apparent ownership of property has, in reality, no actual existence, no action is necessary to set aside the simulated ownership. The creditor can proceed at once against the property of his judgment debtor. *Ibid.*

3. The fact of a title having been acquired at a judicial sale, does not affect the question of simulation. *Ibid.*

SIMULATION (*Continued*).

4. A charge of simulation in a judgment or contract will be controlled by an accompanying averment, that certain specified credits were not allowed, which, if they had been allowed, would still have left a balance due the party obtaining the judgment, or in whose favor the contract was made. *Mahier* v. *LeBlanc*, 207.

5. The facts of this case, it was *held*, establish simulation. *Hayes* v. *Clarke*, 665.

6. The authorities are not reconcilable on the subject of the right of a party to an act, his heirs and assigns to attack the act of simulation. It is more consonant with general principles that they should not be permitted to do so. But *forced heirs* are to be viewed as third persons, and have the right to attack the act made by their ancestors, on the ground of simulation. *Louis* v. *Richard*, 684.

SLANDER OF TITLE.

1. The rule of practice which, in an action of slander of title, imposes on the defendant who reconvenes and sets up title to the property the burden of proof which rests on the plaintiff in a petitory action, applies only to the case where the defendant is out of possession. Where the defendant is himself in actual possession, the plaintiff cannot so change his position by the form of action to which he resorts, as to escape the burden imposed on him by law of establishing his title. In such an action, if the title relied on by defendant is not a valid one, he cannot be permitted to controvert a confirmation of the plaintiff's title by the government, nor to require that the plaintiff's title should be traced from the original claimant to the confirmee. *Griffon et al.* v. *Blanc*, 5.

2. The principles of this case decided in case of *Griffon* v. *Blanc*. *Moore* v. *Blanc*, 7.

3. Principles of this case decided in *Griffon* v. *E. Blanc*. *Pontalba* v. *Blanc*, 8.

See SALE JUDICIAL—*Waddell* v. *Judson*, 18.
See SALE JUDICIAL—*New Orleans* v. *Pellerin*, 92.
See ATTACHMENT—*Whann* v. *Hufty*, 280.

SLAVES.

See EMANCIPATION—*Barclay* v. *Sewall*, 262.
See WILLS—*Turner* v. *Smith*, 417.

STATUTE.

1. The Legislature in 1855 having re-enacted the 17th Section of the Act of 7th April, 1826, without change, thereby ratified the judicial construction the Act had received. *LaSelle* v. *Whitfield*, 81.

2. Where there is a discrepancy between the English and French texts of a statute, the former must prevail. *State* v. *Ellis*, 390.

3. The English text is emphatically *the law*. It was intended and is required that the laws should be published and thus promulgated in both languages; but they are enacted, as required by the Constitution, in the language in which the Constitution of the United States is written. A *bona fide* translation into French, and publication of the original and translation, is all that is required; and a mistake in the translation is in the same category with a typographical error. *Ibid.*

STATUTES (*Continued*).

4. In construing Penal Statutes, courts cannot take into view the motives of the law-giver, further than they are expressed in the Statute. *State* v. *King*, 593.

5. Where a Statute re-enacts a law, and repeals all other laws upon the same subject matter, the former law will be considered as suspended. The promulgation of the re-enacted law, and the repealing provision at the same time, will not have the effect to continue the old law in force, until the new law goes into operation. *Ibid.*

See LAW.
See TAXES—*State* v. *Winfree*, 643.

STEAMBOATS.

See MORTGAGE—*Succession of Broderick*, 521.

SUBROGATION.

1. An accomodation endorser against whom, and his principal, a judgment *in solido* has been rendered, on paying the judgment becomes legally subrogated to all the rights of the creditor in a twelve months' bond given in the case by the principal obligor, and may enforce the payment of such bond by the surety therein. *Toler* v. *Cushman*, 783.

SUCCESSION.

1. Where the sale of succession property is ordered to pay debts, an heir cannot be allowed to retain the price of property adjudicated to him. *Harris* v. *Harris*, 10.

2. The proceeding of *folle enchère* may be resorted to in succession sales, and a new order of sale is not necessary. *Ibid.*

3. The homologation of the account and tableau of distribution must be held conclusive upon the heirs of the deceased as well as upon all other persons. *Bujac* v. *Loste*, 96.

4. An objection to a document offered in evidence that it was not signed by all the parties, goes to the effect of the evidence, and not to its admissibility. A clerical error in the date of an instrument may be amended by parol evidence. *Clauss* v. *Burgess*, 142.

5. The acceptance of an heir is *express* when he assumes the quality of heir in an unqualified manner in some authentic or private instrument, or in some judicial proceeding. *Ibid.*

6. The intention with which an act is signed by the heir is made by Article 983 of the Code the touchstone of its character. If signed with the intention of binding himself as heir, he becomes heir pure and simple. *Ibid.*

7. When a written instrument, purporting to be a notarial act of sale of property of the succession, by all the heirs, was signed by some of the heirs, and others refused to sign it, on the ground that they would render themselves liable as heirs, and the act of sale in consequence was not consummated, it is, nevertheless, an express acceptance of the succession by those heirs who signed the instrument, and they are liable as heirs. *Ibid.*

8. The subsequent formal renunciation of heirs who have thus accepted will not undo the effect of their acceptance. *Ibid.*

SUCCESSION (*Continued*).

9. The acceptance of a succession may be established against an heir by proof of payment of its debts by him. He may, however, rebut the legal presumption arising from such proof, by showing that it was done under protestation or with other motives and intentions than that of accepting. *Loubière* v. *LeBlanc*, 210.

10. Where the heirs have formed a partnership, acts done in the partnership name, which would imply an acceptance of the succession, are presumed to be concurred in by all, and will bind them all in the absence of contrary proof. *Ibid.*

11. The executor has the right, whether *seizin* be given to him in the will or not, to cause sufficient property of the estate to be sold to pay the debts, unless the heirs furnish him with money. *Succession of McLean*, 222.

12. He represents the succession fully when he applies to the court for an order for that purpose. *Ibid.*

13. Under the 12th Section of the Act of the Legislature of 18th March, 1820, reënacted in 1855, a prosecution criminally and a conviction is a prerequisite to the civil liability of a party sought to be made liable for the debts of a vacant estate on the ground of having taken possession of it without authority, with the intent of converting the same to his own use. *Walworth* v. *Ballard*, 245.

14. A paper filed by an administrator purporting to be his account, but which merely gives a statement of the creditors of the estate and the debts which he has paid, but does not show that he had any money in his hands to be distributed, or that he collected or distributed any money of the succession, is not such an account or tableau as could be homologated and made binding upon either the creditors or the heirs, unless they had been personally cited. *Hickman* v. *Flenniken*, 268.

15. Any one heir may compel the administrator to render his account without the concurrence of his co-heirs and without making his co-heirs parties to the suit. *Ibid.*

16. The heirs must be cited and made parties to an account rendered by an administratrix and homologated, or they will not be concluded thereby, except as to passive debts of the estate; for the payment of which, the administratrix is entitled to be credited. *Succession of Harrell*, 337.

17. The Code of Practice, Art. 1027, and Civil Code, Arts. 1267 and 1259, expressly require the Judge to direct the manner in which the partition shall be made and to refer the parties to a notary, whom he shall appoint to make the partition. *Ibid.*

18. If any question be raised in relation to the separate property of the spouses and collations between the heirs of the deceased, such questions should be determined by the Judge, before referring the partition to a notary. *Ibid.*

19. The question touching the liability of the administratrix for any damages which the estate may have sustained in consequence of her negligence, should be determined by the court, previous to the reference of the partition to a notary. *Ibid.*

SUCCESSION (*Continued*).

20. "Any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and he is not obliged to pay the surplus of the purchase money, over the portion coming to him, until this portion has been definitely fixed by a partition." *Ibid.*

21. *Held:* That when the other assets are sufficient to pay all the debts and charges due by the estate, the administratrix is not bound to take any steps to enforce the payment of the purchase money due by the heirs, and consequently cannot be held liable for any loss or damage which may arise from such purchases by insolvency or otherwise. *Ibid.*

22. Under the ruling of the court in the case of *Walworth* v. *Ballard*, 12 An., in an action to render a party liable for a debt due by an estate, on the charge that he had taken possession of the property of the estate without authority, and with the view of appropriating the proceeds to his own use, no recovery can be had without proof of a previous conviction under the penal laws of the State. *Carl* v. *Poelman*, 344.

23. The terms of sale of the property of a succession accepted with benefit of inventory were for cash. The property, an immovable, did not bring the appraisement. *Held:* That there was no sale which the purchaser could compel the tutrix to complete, although the property was ordered to be sold to pay debts. It should have been re-advertised and sold on terms of credit of not less than twelve months. C. P. 990, 991, 992. *Succession of Fritz*, 368.

24. Conventions by which it is agreed that rights to a future succession shall be sold for a particular consideration are prohibited by law, and consequently null. *Reed* v. *Crocker*, 436.

25. The renunciation of a succession must be made by a public act before a notary, in presence of two witnesses. *Ibid.*

26. A special transfer and assignment of rights to an estate, in favor of one person, cannot be viewed as a renunciation, and is not a ratification of a promise to renounce. *Ibid.*

27. To determine the nature and effects of acts, the motives of the parties must be considered. *Ibid.*

28. Collation is not obligatory on collaterals who inherit in default of forced heirs. It is only due by those who have received in advance of their legitimate portion as forced heirs. Special legacies to collaterals, when there are no forced heirs, belong exclusively to the legatees, and are not subject to collation. *Ibid.*

29. A testator who has natural children complies with the law if he bequeaths three-fourths of his estate to *one* or more of his legitimate collateral relatives. They cannot be regarded as forced heirs. *Ibid.*

30. The commission of the curator of an estate cannot be calculated upon debts included in the inventory, but either fictitious in character or exaggerated in amount. *Succession of Foulkes*, 537.

31. The claim of the widow under the Homestead Act of 17th March, 1852, yields to the claim of the minor whose tacit mortgage dates from a period antecedent to the passage of the Homestead Act. *Ibid.*

SUCCESSION (*Continued*).

32. The claim of the widow under the Homestead Act, is superior to all privileges created previously to the death of the husband and subsequently to the passage of the Act, except that of a vendor. Her privilege yields to funeral expenses, expenses of last illness, and law charges growing out of the administration and settlement of the succession.
*Ibid.*

33. It is the duty of the representative of an estate, upon the rendition of an account, to support every charge against the estate by a proper voucher.
*Ibid.*

34. Where a succession is accepted by the heirs purely and simply, the credits belonging to the succession are *ipso facto* and of full right by operation of law divided among the heirs. *Plunkett* v. *Perkins*, 558.

35. The creditors of an insolvent succession have a right to require that their debts should be paid before property, the recorded title and possession of which was in their debtor at the time of his death, can be recovered by one claiming to be the real owner and producing a *counter-letter* to defeat the apparent title in the succession. *Stewart* v. *Newton*, 622.

36. The law does not prohibit an allowance of alimony, when a proper case is shown, to illegitimate colored children, out of the succession of their father. *Collins* v. *Hallier*, 678.

37. The only persons who have an interest in opposing the *submission* by an Administrator of any of the interests of a succession, to arbitrators, are the heirs and creditors. *Lattier* v. *Rachal*, 695.

38. Children to the extent of the *legitime* are not considered as heirs, but as creditors of their father's estate. They are entitled to the revocatory action *only* for the enforcement of their *legitime;* beyond that they are mere ordinary heirs and cannot be heard to allege the turpitude or defeat the judicial confession of their father. Vide *Succession of Trimmell*, decided in 1854, opinion book 24, page 328.
*Maples* v. *Mitty*, 759.

See PRESCRIPTION—*Succession of Waters*, 97.
See MINORS—*Succession of Morgan*, 153.
See EXECUTORS AND ADMINISTRATORS—*Hickman* v. *Flenniken*, 268
*Succession of Grover*, 884.
*Succession of Sloane*, 610.
See HUSBAND AND WIFE—*Succession of Pratt*, 457.
See EVIDENCE—*Miller* v. *McElwee*, 476.

SUPREME COURT.

1. The Supreme Court derives its jurisdiction from the Constitution, and the repeal of a statute which had conferred jurisdiction on it does not affect its powers. *Knight* v. *Knight*, 59.

2. The affidavit of the appellant, in a suit for divorce, that his interests involved in the suit exceed three hundred dollars, is sufficient to give the Supreme Court jurisdiction. *Ibid.*

3. The certificate of the Clerk that "the transcript contains a true copy of all the papers and documents filed and all the proceedings had, all the orders of court of record and all the evidence adduced by the parties

SUPREME COURT (*Continued*).

on the trial of the cause, cannot be contradicted by an affidavit in the Supreme Court that the original citation to the defendant was among the papers when the judgment by default was rendered and when the appeal was taken." *Connolly* v. *Martin*, 80.

4. The Supreme Court is without jurisdiction when an indictment is quashed *in limine*, and consequently no fine has been actually imposed, and the offence charged is not punishable with death or imprisonment at hard labor. *State* v. *LeBlond*, 363.

5. The Supreme Court can only act in criminal cases upon matters which appear by bills of exceptions or assignments of error. *State* v. *Smelser*, 386.

6. A *mandamus* will be issued by the Supreme Court only as auxilliary to its appellate jurisdiction. *State* v. *Judge of the Sixth District*, 405.

7. The Constitution does not confine the judiciary to the examination of such questions as may arise under the laws in force at the time of its adoption, but leaves to the Legislature the power of creating new classes of cases for the action of the courts. *Ibid.*

8. It is not necessary, to constitute a judicial proceeding, that it should have all the requirements of a regular suit. *Ibid.*

9. The Act of 1855 "To enable married women to contract debts and bind their paraphernal or dotal property," is but an extension of the powers already vested in the courts, and the Legislature had the right of imposing the duty required by this Act upon any court of original jurisdiction. *Ibid.*

10. It not appearing that the refusal of the Judge to grant the certificate will occasion the applicant damage to the amount of $300, the *mandamus* is for this additional reason refused. *Ibid.*

11. Writs of *mandamus* and *prohibition* to the District Judges will only be issued in aid of the appellate jurisdiction of the Supreme Court. *State* v. *The Judge of the Fifth District*, 513.

12. Judgment amended in the Supreme Court so as to cover an instalment of the mortgage debt falling due since the order of seizure and sale was granted. *McCalop* v. *Fluker*, 551.

13. The Clerk's certificate being defective, the case was continued by the Supreme Court to enable the Clerk to complete it. *Cory* v. *Eddens*, 582.

14. The original papers from other Clerks' offices will not be received to complete a record in the Supreme Court. *Hays* v. *Clarke*, 666.

15. Excessive damages awarded below will be reduced by the Supreme Court. *Creevy* v. *Breedlove*, 745.

16. Where the amount in controversy does not exceed $300, the Supreme Court is without jurisdiction, unless the case involves the constitutionality or legality of some tax, toll, or impost, or of some fine, forfeiture, or penalty of a municipal corporation. Such a case is not presented in a suit by the farmer or lessee of a market to recover the dues or rents of stands in such market, as fixed by ordinance of the Common Council of New Orleans. *State* v. *The Third Justice*, 789.

SUPREME COURT (*Continued*).

17. If laws and ordinances of a municipal corporation, not unconstitutional in themselves, are misapplied by the inferior tribunal, it is not in the power of the Supreme Court to relieve the parties where the amount involved is insufficient to give jurisdiction. *Ibid.*

18. The Supreme Court is without jurisdiction to determine whether an ordinance of a municipal corporation levying a tax, or imposing a fine, forfeiture, or penalty, less than $300, has or has not been repealed by an Act of the State Legislature. *Police Jury* v. *Villaviabo*, 788.

19. It is too late to raise objections in the Supreme Court as to the time of calling the jury and the notice to the master of the slave where no such objections were made at the trial. *State* v. *Kitty*, 805.

20. The jurisdiction of the Supreme Court is limited by the Constitution and the statutes which have organized the court, and although the parties are willing to waive the objection, the court itself will refuse to entertain an appeal in a case which by law is unappealable.

*Johnston* v. *Cocke*, 859.

See APPEAL.

SURVEYOR GENERAL.

See OFFICE AND OFFICER

TAXES, TAXATION, TAX COLLECTOR AND TAX SALES.

1. Where a tax, levied under a municipal ordinance passed without the legal formalities, has been voluntarily paid, it cannot be recovered back on the ground of error. *Campbell* v. *New Orleans*, 34.

2. There being no law exempting the plaintiff's property from taxation, for the purposes contemplated by the ordinance, he was under a natural obligation to contribute his quota to the support of the municipal government from which he derived protection. No suit will lie to recover what has been paid or given in compliance with a natural obligation. *Ibid.*

3. One can only be bound by the assessment rolls of the parish or district within which one has taxable property, after having failed to appeal without a sufficient excuse.

*New Orleans* v. *Estate of McArthur*, 47.

4. Under the city ordinance providing that "every keeper of a transient theater, circus, menagerie, or other public exhibition or show, shall pay in advance a tax of ten dollars for each performance," &c., a tax cannot be levied on one who keeps a *permanent* establishment for an exhibition consisting of natural and artificial curiosities, for admission to which visitors are charged a certain price.

*New Orleans* v. *North*, 205.

5. The Act of 1855, entitled "An Act to provide a revenue and the manner of collecting the same," is not unconstitutional.

*State* v. *Waples*, 343,

6. The practice of the profession of law is not shielded from taxation.

*Ibid.*

TAXES, TAXATION, TAX COLLECTOR AND TAX SALES (*Continued*).

7. An attorney-at-law may be taxed as well as persons pursuing any other employment. *State* v. *Fellowes*, 344.

8. Where payment has been made of a tax which might have been resisted at law, the money cannot be recovered back:

1st. If the tax is on property, whether exempt from general taxation or not, and the assessment is rather a toll or contribution than a tax, and the party paying has derived a direct benefit from the improvements made by the imposition of the tax or assessment.

2d. Where the property was liable to taxation, and the illegality of the tax depends upon some informality in the passage of the law establishing the tax.

But where the tax is imposed, not for the direct benefit of the party who sues to recover it, as having been paid in error, but for the general support of the commonwealth, and it has been imposed upon property or a profession exempt by law from taxation, the money must be refunded. *Bank of New Orleans* v. *City of New Orleans*, 421.

9. The treaty made in 1853, between the United States and France, confers on Frenchmen, in all the States of the Union, whose laws permit it, the right of possessing real and personal property by the same title and in the same manner as the citizens of the United States, and declares that, in no case, shall they be subjected to taxes on transfers, inheritance, or any others, different from those of citizens of the United States, or to taxes which shall not be equally imposed. *Held:* That the succession of a French citizen, who died before the treaty was made, will not be exempted from the operation of the Act of the Legislature of Louisiana, in 1842, imposing a tax of ten per cent. on successions falling to foreigners. *Succession of Prevost*, 577.

10. The parish Treasurer is the depositary of the School Fund due to his parish; he may demand payment from the collector, and on his default sue him to recover it. *Hendricks* v. *Bobo*, 620.

11. The Act of 1857 which gave to the Auditor of Public Accounts the remedy of a writ of distress against delinquent tax collectors and their sureties, merely provided a remedy of which the auditor could have availed himself while it was in force. But the failure of the auditor to exercise the remedy and enforce the demands of the State against tax collectors, cannot deprive the State of its right to collect the unpaid dues by another remedy provided subsequent to the delinquency; for when an obligation is due, a change in the mode of procedure does not affect it. *State* v. *Winfree*, 643.

12. Where the obligation of the sureties on a tax collector's bond is solidary, the State may proceed against them before obtaining judgment against the principle obligor. *Ibid.*

13. The case as presented by this action, is not inconsistent with the Code of Practice, it is not affected therefore by any repealing clause in the law of 1855, for there is a saving clause in the Act excluding from repeal the provisions of the Code of Practice on the subject. *Ibid.*

TAXES, TAXATION, TAX COLLECTOR AND TAX SALES (*Continued*).

14. Parties who sign a bond impliedly waive defects in it form. *Ibid.*

15. Actions against tax collectors or their sureties, are not prescribed by 1, 2, 3, 4, or 5 years. *Ibid.*

16. In forced sales for taxes the forms of law must be rigidly pursued and a title thus derived cannot be aided by intendment.
*Coucy* v. *Cummings*, 748.

17. When the proceedings are against one described as an absentee, the purchaser at the tax sale would acquire only the interest of such absentee.
*Ibid.*

18. The defendant, sued for a tax bill, objected to the citation, that the advertisement by which he was cited, under the Act of the Legislature, April 15, 1853, was only once inserted in the official newspaper. The objection held not to be valid. *New Orleans* v. *Saloy*, 751.

19. None are legal voters at an election held by order of the Police Jury to decide whether an ordinance imposing a tax for works of internal improvement shall be approved, but the proprietors of landed estate in the parish or municipal corporation where the election is held.
*Police Jury* v. *Landry*, 841.

See EVIDENCE—*State* v *McDonnell*, 741.
See CONSTITUTION—*State* v. *Merchants Ins. Co.*, 802.

TENDER.

See SALE—*Succession of O'Keefe*, 246.
See PAYMENT—*Walker* v. *Brown*, 266.

TRUSTS.

See WILLS—*Partee* v. *Hill's Succession*, 767.

TUTORS AND TUTORSHIP.

1. The new tutor is the proper person to call on the former tutor to account, and has the faculty of standing in judgment for the minor, as regards that cause of action. *Porche* v. *Ledoux*, 350.

2. Art. 615 C. P., as amended by the Act of 1826, does not imply the nullity of a judgment when a minor has been regularly represented according to law. *Ibid.*

3. The Art. 615 finds its application in the case (among others) where the tutor renders his account to the under tutor, the minor in this instance not being fully represented *on the rendition of the account.* *Ibid.*

4. A judgment regularly rendered between the new tutor and the former tutor of a minor, will sustain the plea of *res judicata*, in an action brought by the minor, arrived at his majority, against his former
*Ibid.*

5. The 58th and 59th Articles of the Civil Code, relating to the sending into provisional possession of the presumptive heirs of an absentee, have no application to the question whether letters of tutorship have been improperly granted upon the persons and property of minors whose father is still living. *Succession of Jones*, 397.

TUTOR AND TUTORSHIP (*Continued*).

6. In an action against a tutor for advances, supplies, &c., furnished to the estate of his wards, the under-tutor, who alleges that the advances, &c., &c., went to the benefit of the tutor, personally, and not to the wards, shows sufficient grounds to justify an intervention.

*Urquhart* v. *Scott*, 674.

7. Where the tutor has created an indebtedness without authority of law, the burden of proof is thrown upon the creditor, to show that the indebtedness thus created, was absolutely necessary either for the support of the minors, or for the preservation of their property; and that the supplies thus furnished, actually enured to the benefit of the minors.

*Ibid.*

8. On the death of his wife, defendant qualified as natural tutor to his children. Having married a second time, he left his two daughters with their uncle and under-tutor, and moved with the rest of his family out of the State. Plantiff, the under-tutor, brought suit to deprive the father of his tutorship. The District Court dismissed the suit for want of jurisdiction. But *Held:* The act of defendant in changing his domicil has not deprived his daughters, who have never left the territorial limits of the jurisdiction, which originally conferred their guardianship upon defendant, of the protection of the court which conferred such guardianship. *Lyons* v. *Andrews*, 685.

9. Sequestration of the slaves maintained, and the appointment of the father as tutor annulled. *Ibid.*

10. A family meeting in consenting to the natural tutrix, who is about to marry a second time, retaining the tutorship of her minor children after such marriage, have no right to restrict her in the legal exercise of her rights and discharge of her duties as tutrix, and a requirement which they may undertake to make, that all her drafts for moneys belonging to the minors shall be drawn to the order of, and endorsed by, the under-tutor, is mere surplusage, and will be considered as not written.

*Stone* v. *Payne and Harrison*, 726.

See MINORS.

USURY.

1. Since the Statute of 1844, money paid for usurious interest can be reclaimed if suit is brought within one year after the payment.

*Keane* v. *Branden*, 20.

2. A commission merchant cannot charge a planter for insurance unless he was instructed to insure, or a subsequent ratification by the latter is shown. Eight per cent interest, and two and one-half per cent commission, avowedly charged for advancing, taken together constitute an usurious charge. *Gilly* v. *Berlin*, 723.

WARRANTOR AND WARRANTY.

1. Where work was done on the road and levee under a contract with the Police Jury, in which it was stipulated that the contractor should not look to the parish for payment but to the owner of the land, and it turned out that the land on which the road and levee was made belonged to the United States, it was held that the parish was liable.

*Semel* v. *Gould*, 225.

WARRANTOR AND WARRANTY (*Continued*).

2. There was an implied warranty on the part of the Police Jury, that the land on which the work was to be done belonged to persons whose property could be reached under their ordinances, to defray the expenses of such work. *Ibid.*

3. The warrantor, who is not represented by counsel at the trial, is not bound by admissions made by the other parties of the contents of notarial acts not produced in evidence. *Weber* v. *Coussy*, 534.

4. The apparent servitude of passage or right of way is an appurtenance of the property sold, and any sale implies, without its being expressed a warranty against acts of the vendor, that would prevent or interfere with the full enjoyment of the thing sold.

*Bruning* v. *Canal and Banking Co*, 541.

WIDOW (HOMESTEAD, PRIVILEGE OF).

See SUCCESSION—*Succession of Foulkes*, 537.

WILLS.

1. The deceased by his will, which was executed in 1848, after a legacy to his wife of certain specified property, declared as follows: "All the balance of my property, I will to my six brothers and two sisters, to be equally divided between them, after all claims against me are paid. And I hereby appoint *John Valentine*, my brother, to execute this will; and, in case of his death or absence, *Palitzen Belcher*, my wife's brother. I would recommend that this property be sold, for one-fourth cash, and the balance on six, twelve, eighteen and twenty-four months' time; and the notes secured by mortgage to secure payment. I would recommend that the money be paid to them, so as to be of the greatest advantage to them possible. There will be somewhere from two to three thousand dollars for each of them, if it were so divided at the present time. What my property is, and where situated, you will find by the copy of the titles in my bank-box. Although I have made several errors, yet I think the above will be easily understood. I have one house on Circus street; two on Gravier; two on Adele; one corner of Camp and St. Mary; and one vacant lot, corner of Plaquemines and Seventh streets." *Held:* That this was a disposition of the property which the testator then had, and was not intended to cover his future acquisitions; and that, consequently, property purchased by the testator in 1853, after the will was made, did not pass under it."

*Succession of Valentine* 286.

2. "A disposition, the terms of which express no time, neither past nor future, refers to the time of making the will." C. C. 1715.

*Ibid.*

3. The will of the testator *John D. Fink*, of New Orleans, contained the following clause: "*That after the payment of my just debts and the legacies mentioned herein above mentioned, that the proceeds of the whole of my estate, property, rights, effects and credits be applied to the erection and maintenance and support of a suitable asylum in this city, to be used solely as an asylum for protestant widows and orphans, to be called Fink's Asylum: and I do hereby authorize my friend Diedrich Bullerdieck,*

WILLS (*Continued*).

*after my decease, to name and appoint three worthy and responsible persons as trustees to carry out my said intentions respecting the aforesaid asylum.*" It was held, that the widows and orphans for whom it was intended the building to be erected should be a refuge and a home, were the objects of the testator's bounty. *Fink* v. *Fink*, 301.

4. The clause in the will in reference to the appointment of trustees, is to be construed as a delegation by the testator to a third person of the choice of administrators of a portion of his estate, and this clause is a mere nullity, and is to be considered as not written. C. C. 1506, 1566. *Ibid.*

5. The words "Protestant widows and orphans," used in the will, taken in connection with other words, indicate with certainty the meaning to have been "Protestant widows and orphans in the city of New Orleans." *Ibid.*

6. The general form of expression used by the testator, as to the objects of his benevolence, is sanctioned by the Article 1536 of the Civil Code, which sanctions a donation to the *poor of a community*, and the word community in this Article means a municipal corporation. *Ibid.*

7. The qualification "Protestant" of the nouns-substantive widows and orphans, is not so vague as to vitiate the bequest. It will be for the administrators of this charity to determine what widows and what orphans come under the denomination of "Protestant." *Ibid.*

8. The Article 1536, of the Code, which provides that donations made for the benefit of the poor of a community shall be accepted by the administrators of such community, although found under the head of donations *inter vivos* is applicable to donations *mortis causa*. *Ibid.*

9. The corporation formed by the title of the Fink Asylum since the death of the testator is without interest. *Ibid.*

10. The charity created by the testator's will is legally to be administered only by the city corporation of New Orleans. *Ibid.*

11. In interpreting a will, the intention of the testator must be ascertained as far as practicable, and regard will be had to all the facts and circumstances under which the will was made. *Succession of Thorame*, 384.

12. An acknowledgement by the father of natural children by his own slave, besides being offensive to morals, is a mere nullity. *Turner* v. *Smith*, 417.

13. A slave can neither sue for alimony nor inherit. *Ibid.*

14. The Act of the Legislature of the 6th March, 1857, which forbids the emancipation of slaves thereafter in this State, renders impossible the enfranchisement of slaves under a last will and testament, not carried into execution for that purpose prior to the passage of the Act of the Legislature. *Ibid.*

15. The testator, after a disposition in favor of his slave *Rachel* and her children, of one-third of his estate, declared as follows: "*I give and bequeath the remainder of my estate to my said executor, Charles Dudley Smith.*" *Held:* That as it was not the intention of the testator to give to his executor the portion of the estate previously devised to others,

WILLS (*Continued*).

the legacy in favor of the slaves which lapsed in consequence of the impossibility of their enfranchisement, enured to the benefit of the heirs of law of the testator as in case of intestacy. *Ibid.*

16. A testator having no descendants living, devised his whole estate to his mother, brother and sister, omitting entirely his father who survived him. The father made a notarial act of renunciation of all his rights and interest in the estate of his deceased son. Creditors of the father claimed the right to have the renunciation set aside on the ground that it was made by their debtor in fraud of their rights as judgment creditors, and to have the portion of the estate for which they alleged the father was the forced heir of his son, subjected to the payment of their claims against the father. *Held:* That such an action could not be maintained. *Tompkins* v. *Prentice*, 465.

17. There are rights of the debtor which the creditors cannot exercise, even should he refuse to avail himself of them. *Ibid.*

18. The debtor in this case would only have the right to demand the reduction of the donation *mortis causa* to the disposable portion. *Ibid.*

19. By Art. 1491 Civil Code, this reduction can be sued for only by *forced heirs or by their heirs* or assigns; the word "assigns" is defined to mean those whose rights have been transmitted by particular title, such as sale, donation, legacy, transfer and cession. C. C. 3522. *Ibid.*

20. The creditors of the forced heirs are not embraced within the definition, and cannot sue for the reduction. *Ibid.*

21. When the law requires certain forms to be observed in the *confection* of a will, the party who relies upon any want thereof, should expressly allege such informality. MERRICK, C. J., and COLE J. *Lawson* v. *Lawson*, 603.

22. The law does not require in nuncupative testaments by public act, that mention be made in the will that it was *dictated* by *the* testator to the notary in the *presence* of the witnesses. It is sufficient if express mention be made that it was dictated by the testator and written by the notary as dictated. MERRICK, C. J., and COLE, J. *Ibid.*

23. It appears by Art. 1571 C. C., that express mention is required to be made, in nuncupative testaments by public act, of the facts that the will was dictated by the testator and written by the notary, as it was dictated —but no such *express mention* seems to be required of the fact that it was "written in presence of the witnesses." By the next clause of Art. 1871, it appears that the presence of the witnesses when the will is *read* to the testator, must be expressly mentioned. It would seem to follow that the presence of the witnesses at the *dictation*, (which had been uniformly held to be necessary in a will of this form—*Langley* v. *Langley*, 12 La. 114; *Mouton* v. *Cameau*, Ann. 566.) may be implied from the general tenor of the will. SPOFFORD, J. *Ibid.*

WILLS (*Continued*).

24. Where it is fairly deducible from the tenor of the will that the witnesses were present during its dictation, the burthen of proof to establish the contrary is upon those who attack the validity of the will. Temporary absence of one of the witnesses, and for the purpose of getting a drink of water, in a passage opening upon the room where the Act was received by the notary, will not be sufficient to invalidate the will. SPOFFORD, J. *Ibid.*

25. Temporary cessation during the confection of a will, occasionally induced by the weakness of the testator, does not constitute such an interruption as will vitiate the will. *Ibid.*

26. The appointment by will of trustees to receive a sum of money bequeathed by the testator and to pay the interest on it annually to the legatee, will be disregarded if the legatee refuses to acquiesce in the creation of such an agency. *Partee* v. *Succession of Hill*, 767.

27. The legatee under such a disposition, is capable of standing in court and directly demanding payment of the legacy. *Ibid.*

28. *Fidei-commissa*, the trusts of the English law, cannot be created in Louisiana and enforced in our courts. *Ibid.*

29. BUCHANAN, J. The testator, who lived in Mississippi, owned, besides his property in that State, a large real estate in Louisiana, worth $340,000. He bequeathed to his daughter, a married woman, $20,000, upon the express condition that she should renounce, within twelve months after his disease, all claims upon the property of his succession situated in Louisiana: failing in which, she should forfeit the legacy of $20,000. This sum was paid to her, and a deed of relinquishment executed by her in accordance with the requirements of the will. She received also the further sum of $25,000 from the property of the father's succession situated in Mississippi. *Held:* That the receipt of these sums did not amount to a valid ratification of the act of relinquishment of her claims upon the estate of her father situated in Louisiana; that this deed of relinquishment was without effect, whether tested by the law of Mississippi or of this State. If the law of the former State is to govern, the deed would be void for want of the acknowledgment of the grantor, a married woman, apart from her husband, before a Judge or Justice of the Peace, that she signed, &c., without threats or compulsion of her husband. If the Mississippi statute, prescribing these formalities, be laid out of view, the general principle of the common law, which prevails in Mississippi, that a married woman being considered *sub potestate viri*, can, in general, do no act to bind her, would render this deed equally inoperative. 2. If the deed of relinquishment be judged by the law of Louisiana, it is equally void, as not having a lawful purpose. The testator left three children, who are his forced heirs, as to his real estate and slaves, situated in Louisiana, and the clause of his will requiring one of them to relinquish her lawful claim as heir to one-third of his Louisiana property, exceeding in amount $100,000, on receiving $20,000 cash from his executors, under the penalty of being completely disinherited, was contrary to law, and, there-

WILLS (*Continued*).

fore, not a valid cause or consideration for the deed of relinquishment. The two sums of $20,000 and 25,000 must be viewed simply as so much received by her on account of her inheritance, and which she may be bound to collate. *Hoggatt* v. *Gibbs*, 770.

30. SPOFFORD, J., concurring. *Held:* That in so far as the deed of relinquishment affected property situated in Louisiana, its force and effect must be determined by the law of this State, but expressed no opinion upon the validity of the deed, under the law of Mississippi. *Ibid.*

31. MERRICK, C. J., also concurred in the opinion of BUCHANAN, J., but did not consider it clear that the deed of relinquishment should be considered as void; and doubted whether this deed should be set aside without plaintiffs first tendering to the defendants the $45,000 which was received as its consideration out of the Mississippi estate, and which the testator had a right to withhold from his daughter. *Ibid.*

32. A will is null and void which is contained in one and the same act with the will of another person. C. C. 1565. *Oreline* v. *Haggerty*, 880.

33. It cannot be inferred that the testator intended to give a general *seizin* to the executor from the following expressions: "*I leave the whole of this foregoing, as written, to the management of Fergus Hawthorn, to have my request carried out fully and faithfully.*" *Succession of Boatwright*, 893.

See LEGACY—*Orphan Society* v. *New Orleans*, 62.
See SUCCESSION—*Tompkins* v. *Prentice*, 465.

WITNESS.

1. The clerk of the ship is a competent witness for his employers to prove the instructions given by the owner to the clerk, in shipping the slave. *Farwell* v. *Harris*, 50.

2. A formal release of a witness from any liability over to the party interrogating him, annexed to the interrogatories and transmitted with the commission under which he was examined, is sufficient to remove the objection to his testimony on the score of interest *Ibid.*

3. In an action against a common carrier upon the penal statute for taking slaves out of the State without the consent of the owner, the ostensible owner in whose name the slave was shipped, and the vendor of such owner, have no interest in the suit, and are competant witnesses for the defendant. The judgment in such an action is not conclusive as to the title to the slave. *Ibid.*

4. A witness, called to testify to the existence and contents of a deed, cannot be objected to on the ground that he obtained his information as attorney of the party against whom he is called to testify, if the deed had been intrusted to him after the relation of attorney to the party had ceased. *Williams* v. *Benton*, 91.

5. The assignor of a claim, being bound to warrant the existence of the debt assigned, is not a competent witness to prove the debt, without a previous release, and cannot establish such release by his own testimony. *Delee* v. *Sandel*, 208.

WITNESS (*Continued*).

6. The usual and proper course is, for the release to be tendered to the witness before he is sworn in the cause; and when the testimony is taken under commission, to insert it in the return, with the Commissioner's certificate that it was so tendered. *Ibid.*

7. A witness may be interrogated on cross-examination upon matters unconnected with those on which he was examined in chief.

*Davidson* v. *Lallande*, 826.

See EVIDENCE—*Massey* v. *Hackett*, 54.